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No. 84-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In the instant case, the Federal Energy Regulatory Commission ("FERC") instituted a comprehensive regulatory proceeding to address the need for additional fish protection measures at five federally licensed and hydraulically related dams located in the middle portion of the Columbia River. During the pendency of this proceeding, the license for one of the dams, operated by Petitioner Public Utility District No. 1 of Chelan County, Washington, ("Chelan") expired. FERC issued a new license to Chelan, reserving the right to impose further conditions as might be appropriate once the comprehensive proceeding was completed. The United States Court of Appeals for the Ninth Circuit vacated FERC's order granting the license.

The questions presented are:

1) Whether in order to fulfill its obligations under Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332, the Federal Energy Regulatory Commission must prepare an environmental impact statement on relicensing of a hydroelectric project pursuant to Section 15 of the Federal Power Act, 16 U.S.C. § 808, where the relicensing involves no change in the status quo of the project or environment?

2) Whether Section 6 of the Federal Power Act, 16 U.S.C. § 799, bars the Federal Energy Regulatory Commission from issuing a full term license for a hydroelectric project containing a reopener clause authorizing the Commission to impose further conditions for the protection of fish resources upon completion of pending comprehensive proceedings.

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

Public Utility District No. 1 of Chelan County, Washington

Federal Energy Regulatory Commission

Confederated Tribes and Bands of the Yakima Indian Nation

National Wildlife Federation

Malcolm Baldrige, Secretary of Commerce

Washington State Department of Fisheries

Washington State Department of Game

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as modified, of which review is sought is reported at 746 F.2d 466 (1984). The initial opinion of the court of appeals and its order of October 30, 1984, modifying its initial opinion and denying petitions for rehearing are reproduced in the Appendix at 1-22 and 74-75. The orders of the Federal Energy Regulatory Commission set aside by the Ninth Circuit are reported at 15 F.E.R.C. ¶ 62,187, 19 F.E.R.C. ¶ 61,223 and 21 F.E.R.C. ¶ 61,264. The FERC's orders are reproduced at App. 23-73.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit is dated June 7, 1984. Timely petitions for rehearing were filed by Public Utility District No. 1 of Chelan County, Washington and by the Federal Energy Regulatory Commission. Those petitions were denied on October 30, 1984. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1). An extension of time to February 27, 1985, in which to file the instant petition was granted by this Court on January 23, 1985.

STATUTES AND REGULATIONS INVOLVED

This case involves consideration of sections 6 and 15 of the Federal Power Act, 16 U.S.C. §§ 799 and 808 (1982), and section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1982). These provisions are reproduced in the Appendix at 74-76.

STATEMENT OF THE CASE

Public Utility District No. 1 of Chelan County, Washington ("Chelan") is the licensee of Rock Island Project No. 943 ("Rock Island"). Rock Island was first licensed in 1930 by the Federal Power Commission, the predecessor to the Federal Energy Regulatory Commission ("FERC" or "Commission"). Rock Island is one of ten hydroelectric projects on the Columbia River. Four of the projects, including Rock Island, are publicly-owned, operating under licenses issued by the Commission. These four projects, comprising five dams, are geographically located in the middle of the Columbia River. The other six projects are federally owned and operated, two upstream from the FERC licensed projects and four downstream from the FERC licensed projects.

Rock Island was the first project to span the Columbia River, and today it is a major energy resource of the

Pacific Northwest. It generates an average of 2780 million kilowatt hours of electricity annually, and provides electric service to customers of Chelan and Puget Sound Power & Light Company in central and western Washington.[1] The need to protect the fish resources of the river has been recognized since the inception of the Project. "Fish ladders" were installed at Rock Island at the time the dam was constructed to permit the upstream migration of adult anadromous fish.[2] Additional fish protection measures were installed when the Project was substantially redeveloped pursuant to a license amendment issued in 1974.

1. *FERC Proceedings*

On January 18, 1977, Chelan filed with the Commission its application for a new license. In contrast to a 1973 license amendment application in which Chelan proposed a major project expansion and for which the Commission prepared an environmental impact statement,[3] Chelan did not propose any new construction or change in operations in its application for license renewal. The application was filed solely because the existing license was due to expire in 1980.

The Washington State Department of Game ("WDG"), the Washington State Department of Fish ("WDF") and the National Marine Fisheries Service ("NMFS"), an agency within the United States Department of Commerce,

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[1] Order Issuing New License (Major), 15 F.E.R.C. ¶ 62,187 (May 13, 1981), App. 23.

[2] Anadromous fish are those species that ascend the rivers from the sea for seasonal breeding. The anadromous fish resources of the Columbia River include salmon and steelhead trout. Each year adult fish return from the ocean and migrate upstream to spawn. After hatching and growing in fresh water, juvenile fish migrate downstream to the ocean where, as adults, they are subject to ocean harvest.

[3] 51 F.P.C. at 1141, 1143 (1974), App. 89.

intervened in the proceeding, expressing concerns about Rock Island's effects on anadromous fish. They requested that additional studies be conducted to identify the Project's impacts on fish and wildlife and proposed various measures to be included in the new license such as specified minimum flows and spills to facilitate juvenile fish migration.

Contemporaneously, WDF/WDG, NMFS and the Confederated Tribes and Bands of the Yakima Indian Nation had requested the Commission to initiate a comprehensive proceeding on the same anadromous fish issues as they relate to all five of the federally-licensed Mid-Columbia dams, including Rock Island.[4] The Commission granted the requests and initiated an omnibus proceeding concerning all five licensed dams to develop a system-wide approach to protecting the anadromous fish resource in the Columbia River.

All parties to this case, except the National Wildlife Federation, became parties in that proceeding. The issues being addressed in the comprehensive proceeding ("Mid-Columbia proceeding") include: application of interim measures for the protection and enhancement of juvenile salmonids; development of long-term measures to provide equitable treatment among fish and wildlife, power generation and the other purposes for which the projects are operated and managed; and the impact of the projects, if any, on the treaty rights of the Yakima Indian Na-

[4] Operations of the four licensed projects and of the two upstream federal projects are hydraulically related; that is, the discharge of water from each dam flows directly into the reservoir of the next downstream project. None of the licensed projects can increase the level of minimum flow over a sustained period without an adequate release of water from the upstream federal storage projects. The energy generated from these six projects forms a significant part of the power resources of the Pacific Northwest. To optimize the generation of electricity to meet system requirements, the operation of each of the projects is coordinated on an hourly basis pursuant to contract.

tion.[5] In 1980, the parties to the Mid-Columbia proceeding reached an interim five-year settlement agreement to control the operations of each of the dams.[6] The agreement reached between Chelan and the agencies and Yakima Indian Nation was approved by the Commission on March 20, 1980. 10 F.E.R.C. ¶ 61,257, App. 121.

Meanwhile, no competing applicant had appeared to contest Chelan's application for license renewal. While Chelan's application was being processed by the Commission, the old license expired on January 20, 1980. As required by the Federal Power Act, 16 U.S.C. § 807, the Secretary of the Commission issued an annual license containing the same terms and conditions as the old license to Chelan on January 4, 1980 for the period January 20, 1980 to January 20, 1981. The Secretary also stated in the notice of issuance of annual license that if a new license was not issued by January 20, 1981, an annual license would be issued each year effective January 21 until a new license was issued. App. 150.

On May 13, 1981, the Director of the Office of Electric Power Regulation issued a new license to Chelan containing forty-four updated license conditions.[7]. 15

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[5] See Order Consolidating Proceedings (March 7, 1979), App. 109; Order Approving Interim Settlement (March 20, 1980), App. 121.

[6] Under the settlement, specific daily average minimum flows, which improve fish travel time downstream and thereby increase juvenile survival, were to be maintained at each dam. A minimum spill level of 10 percent was established for the spring migration period to enable juvenile fish to migrate over the spillways rather than through the powerhouse. The licensees agreed to provide 200,000 pounds of hatchery production capacity. The settlement also established a five-year study program to evaluate alternative collection and bypass systems, mortality rates of juvenile salmonids on a system-wide (four-project) basis, turbine mortality rates, spill effectiveness, and the feasibility of transporting juveniles downstream. Offer of Settlement, App. 136-141.

[7] Authority to act on uncontested license applications has been delegated by the Commission to the Director. 18 C.F.R. § 375.308 (1984).

F.E.R.C. ¶ 62,1[illegible], App. 23. The Director noted in the Order Issuing New License the concerns of WDG, WDF and NMFS about the Project's impact on anadromous fish. App. 26. Accordingly, a number of measures were included in the new license to ensure that the results of the fish protection studies then underway in the Mid-Columbia proceeding could be implemented once they became available. As the Director stated in the Order Issuing New License with respect to these "reopener" clauses:

> Under Articles 12 and 15 of this license, the Commission reserves the right to prescribe minimum flow releases and other changes in project operation to preserve and enhance fish and wildlife resources.

App. 27.

Chelan accepted the new license with all its terms and conditions, including the articles permitting changes in the Project structure and operations to ensure the adequate protection of fish resources.

The Director also stated in the order that, based upon an environmental assessment performed by the Commission Staff, relicensing under the conditions described above would not be a major federal action significantly affecting the quality of the human environment:

> Issuance of this license will permit continued project operation, which began over 50 years ago. No new construction, except for recreation development, or change in project operation is proposed . . . . On the basis of the record, including agency and intervenor comments and staff's independent analysis, it is found that issuance of a license for this project, as conditioned, is not a major Federal action significantly affecting the quality of the human environment.

App. 29-30.

On July 13, 1981, NMFS, joined by the Yakima Indian Nation, filed an appeal of the Director's order. The Com-

mission denied the appeal, finding that each of the issues raised was properly the subject of the Mid-Columbia proceeding. The Commission stated that:

> The piecemeal approach advocated by the Fisheries Service would be costly and probably would not obtain adequate results. The problems demand a system-wide approach. That is why we ordered the separate [Mid-Columbia] proceeding.

App. 61.

Responding to NMFS' contention that fish were not receiving equitable treatment with power production, the Commission stated:

> The new license is conditioned so that appropriate changes in project operation and structures can be made, if needed, to ensure that the fisheries resource receives the appropriate treatment. The decision, however, cannot be made without an adequate record. The separate proceeding has developed interim protections for the resource while a record is being developed to provide for long-term protection and enhancement of the resource.

App. 64.

NMFS sought rehearing of the Commission's denial of its appeal, reiterating the arguments that it had raised on appeal. Responding again to NMFS' contentions that the Commission's approach of issuing a new license with conditions permitting later inclusion of additional fish protection measures violated the National Environmental Policy Act ("NEPA"), the Commission stated in its Order On Rehearing:

> We find that the environmental record already compiled is adequate to support our order issuing a new license for the existing Rock Island Project, especially in light of our decision to include open-ended conditions pertaining to fisheries that will be finalized on the basis of the record compiled in the ongoing proceeding discussed above.

App. 70.

With respect to NMFS' renewed assertion that issuance of a new license with a reopener clause constituted inequitable treatment of fish, the Commission, recognizing its broad public interest responsibilities, stated:

> When there is only one applicant for the new license, it frequently makes sense to go ahead and issue the new license before the lengthy studies are complete, *so as to put in effect sooner the new license conditions, which relate to all aspects of the project and in many cases strengthen the protection of other aspects of the public interest in the project.* Because this procedure enhances our regulatory posture and enables us to better deal with environmental issues, we cannot concur in NMFS's complaint that the fisheries are being short-changed by our issuance of the new license.

App. 70-71 (emphasis added).

2. *Court of Appeals Proceedings*

The Secretary of Commerce, on behalf of NMFS, and the Yakima Indian Nation petitioned for review of the FERC orders to the United States Court of Appeals for the Ninth Circuit, and WDF/WDG and Chelan were granted leave to intervene. The Ninth Circuit held that a new license should not have been issued prior to completion of another EIS. The court acknowledged that it and other courts of appeals had held that actions that were phases of continuing activity did not require preparation of an EIS and that "viewed narrowly, relicensing fits within the FERC's characterization and comports with the cases cited above." App. 19. The court sought to distinguish the instant situation on the ground that "[r]elicensing is substantially equivalent to issuing an original license," App. 21, that there was "no doubt that if this action involved the decision to license new construction of a hydropower project such as Rock Island, an EIS would be required," App. 19, and that "[r]e-

licensing involves a new commitment of the resource . . . ." App. 21. The court of appeals stated that an EIS was necessary so that the Commission could consider the environmental impact of the options of relicense to Chelan, relicense to another licensee, and issuance of a non-power license even though there was no other applicant for a license and no one had suggested the non-power option as an alternative.[8]

The Ninth Circuit also held that the procedure adopted by the Commission of issuing a new license with conditions reserving authority to change project structures and operations upon completion of the Mid-Columbia proceeding violated the Federal Power Act and the Commission's regulations on the ground that "FERC must consider fishery issues *before*, not after, issuance of a license." App. 10 (emphasis in original). The Ninth Circuit rejected the arguments offered by the Commission and Chelan that use of "reopener clauses" such as those contained in the new license comported with FERC's statutory duty to consider fishery issues, and that the procedure chosen by FERC of deferring additional fish protection issues until completion of Mid-Columbia served the public interest. The principal reason supplied by the court for rejecting the arguments of FERC and Chelan was that "reopener clauses" curtail the Commission's discretion because once a license is granted the project may only be modified with the licensee's consent. The court also opined that "as a practical matter, the method used by FERC here removes the incentive for a speedy and efficient resolution of fishery issues." App. 14. Anomalously, the court held that FERC should have chosen the

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[8] In its initial opinion, the Ninth Circuit also stated that FERC should consider a fourth option of federal takeover of the Project. App. 20. However, in its order denying the petitions for rehearing of FERC and Chelan, the court of appeals acknowledged that federal takeover was precluded by the provisions of 16 U.S.C. § 828b and therefore need not be considered by FERC in this case. App. 75.

option of continuing to issue annual licenses to Chelan until the fish studies were complete on the ground that the Mid-Columbia fish measures could have been incorporated in an annual license through use of the "reopener" clause. App. 13.[9]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision raises serious implications concerning FERC's ability to administer its licensing function under the Federal Power Act. The court of appeals' determination that an EIS must be prepared before an existing project is relicensed would over time create a substantial and unwarranted burden upon the Commission, the utility industry and ultimately the ratepayers served by the projects.

In its petition for rehearing to the court of appeals, the Commission estimated that over the next 20 years, approximately 400 projects will be considered for relicensing, and that preparation of an EIS requires an average of between one and two years to complete. This will create an enormous administrative burden upon FERC. Preparation of an EIS in every relicensing situtation also would have a significant financial and regulatory burden upon the industry. Applicants for new licenses would be required to prepare and file far more detailed environmental reports and studies than are currently required by FERC in order to enable FERC to prepare its EISs. Because these EISs would be prepared as a part of FERC's administration of Part I of the Federal Power Act, the cost thereof would be borne by

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[9] On essentially the same grounds, the court also held that it was a violation of FERC's regulations, 18 C.F.R. § 4.41 (1981), for FERC to defer preparation of Exhibit S, and noted that FERC's deferral of additional fish protection measures presumably also constituted a failure to meet its obligation to give fish "equal consideration" under the Fish and Wildlife Coordination Act and "equitable treatment" under the Pacific Northwest Electric Power Planning and Conservation Act. App. 14-18.

the licensees pursuant to Section 10(e) of that Act. Ultimately these additional costs would be passed through to the ratepayers who rely on these projects for electric service. The requirement of preparing EISs will also result in greater delay before a project is relicensed due to the time needed to prepare the EIS and to the likelihood of more extensive licensing proceedings before a new license can be issued. Preparation of an EIS involving such additional costs, delay and severe administrative burdens upon FERC is unwarranted when relicensing involves no change in project operations and thus cannot be considered a change in the status quo.

The court of appeals' determination that "reopener" clauses cannot be used by FERC to impose additional conditions upon completion of further studies or of related comprehensive proceedings will have an immediate and substantial impact upon the Commission's licensing function with respect to both existing and proposed projects. As stated in FERC's petition for rehearing, of the 125 licenses that the Commission issues on average each year, approximately 100 contain "reopener clauses." These generally relate to long-range issues such as fish protection, minimum flows and water quality. In many such instances, effective prelicensing studies cannot be conducted because the only way to determine the impact of the project in question is through monitoring of its actual operation. Under the Ninth Circuit's decision, the Commission and potential licensees are forced to decide what conditions to impose and what to accept without the necessary data.

It is thus beyond dispute that the decision of the Ninth Circuit constitutes a serious intrusion upon FERC's ability to structure its own procedures and upon its effort to fulfill its duties in what it believes to be the most orderly manner, which in the instant case is its determination that it should resolve fish issues on a system-wide basis in the pending Mid-Columbia proceeding. Because the

Ninth Circuit's decision is not mandated by statute, is not necessary to accomplish effective fish protection measures in the public interest, and constitutes a serious intrusion into the agency's effort to transact its business in an orderly fashion, Chelan respectfully submits that the instant petition for a writ of certiorari should be granted.

I. The Decision Below Is In Conflict With Settled Law That There Is No Need to Prepare an EIS Where There is No Change in the Status Quo of the Environment and That There is no Need to Consider Remote and Speculative Alternatives.

In examining NMFS' contention that an EIS was required, the Ninth Circuit recognized the principle, App. 19, that there is no need to prepare an EIS when there will be no change in the status quo, citing a number of the cases relied on by FERC and Chelan.[10] As stated above, the Commission had prepared an EIS in 1974 in connection with the amendment to the license approving construction of the second powerhouse in which it considered in detail similar concerns raised by WDF, WDG and NMFS. 51 F.P.C. at 1143, App. 89. Chelan's application for relicensing did not contain any proposals for further construction or change in project operations. The court of appeals, however, sought to distinguish all of these cases, stating that relicensing was more than a phase in a continuous activity, but was rather "a new commitment of the resource". App. 21.

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[10] *E.g., San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) ("the Navy was not required to evaluate the environmental consequences of the lease as if the Navy were proposing to establish this multi-million dollar industrial complex for the first time"); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-117 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (no EIS was required when federal government aided the purchase of an existing airport by a local airport authority); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (lease of existing parking lot to private firm did not change the status quo).

Chelan respectfully submits that the Ninth Circuit's decision in the instant case is inconsistent with the plethora of cases that hold that an agency need not prepare an EIS if no change in the status quo is contemplated. The Ninth Circuit's reasoning would render that principle meaningless since virtually any type of government action, such as a new lease, a new contract or a new license of any kind could be considered "a new commitment of the resource."

The extent of the Ninth Circuit's departure from the mainstream of cases is illustrated by the Fifth Circuit's decision in *Sierra Club v. Hassell*, 636 F.2d 1095 (5th Cir. 1981). In that case, a hurricane had destroyed a bridge, and the question was whether an EIS was required before the bridge could be rebuilt. The Sierra Club maintained that an EIS was required because the status quo should have been considered to be the area without the bridge. The Fifth Circuit held, however, relying on the Ninth Circuit's decision in *San Francisco v. United States*, 615 F.2d 498 (1980), that:

> it was not unreasonable for the agencies to conclude that the status of the environment to be considered was that with the bridge in place, prior to its destruction. The reconstruction project will only restore an environmental situation that had existed for twenty-four years. 636 F.2d at 1099.

In the instant case, the status quo certainly remains unchanged where no new construction is contemplated, and where relicensing simply continues in existence an environmental situation which has already been fully considered in the Commission's 1974 EIS. As in *Sierra Club v. Hassell*, it was thus not unreasonable for FERC to conclude that the status quo of the environment to be considered was with the Project in place.

In addition to being inconsistent with decisions concerning what constitutes the status quo for purposes of

evaluating whether an EIS is required, the Ninth Circuit's decision in the instant case is in conflict with the directions to the courts of appeals concerning their role in reviewing the sufficiency of an agency's consideration of environmental factors given by this Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

In its initial opinion, the court of appeals held that an EIS was required so that FERC could consider the varying environmental effects of federal takeover of the Project, relicense to Chelan, relicense to another licensee, or issuance of a non-power license. App. 20-21. In its order denying the petitions for rehearing of Chelan and FERC, the Ninth Circuit eliminated the alternative of federal takeover. However, it reaffirmed that an EIS was needed to consider issuance of a non-power license and relicense to another licensee. The court reached this conclusion despite the fact, recognized by the court itself, that "no new entity is seeking the right to operate Rock Island," App. 8, and that no one had applied for issuance of a non-power license.

As this Court stated in *Vermont Yankee*:

> . . . the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.

435 U.S. at 551. The Court in *Vermont Yankee* also quoted from the decision of the Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (1972), to the effect that an agency need not consider "alternatives [that] are deemed only remote and speculative." *Id.* As the name implies, a non-power license involves complete cessation of power generation at the project. An applicant for a non-power license must include in his applica-

tion a "statement of the probable impact which conversion of the project to non-power use will have on the power supply of the system served by the project" and a "proposal for the removal or other disposition of power facilities of the project", 18 C.F.R. § 16.7(a) & (c). As stated above, the Rock Island Project is a major generating resource which is relied upon to serve the customers of Chelan and Puget Sound Power & Light Company in central and western Washington. Non-power use of Rock Island thus would be a most extreme and unjustifiable means of resolving environmental problems associated with the seasonal migration of juvenile anadromous fish at the Project.

II. The Decision Below is in Conflict With Decisions of the District of Columbia Circuit and With Congress's Approval of the Longstanding Commission Practice of Issuing Licenses With a Reservation of Authority to Modify Project Structures and Operations.

With respect to the Commission's power to modify the terms of existing licenses, the court of appeals rejected the argument by Chelan and FERC that the Commission could fulfill its statutory duty to consider fish issues by reserving the right to insert fish protection measures upon completion of the necessary studies in the pending Mid-Columbia proceeding. The basis for the court's rejection of the argument of Chelan and FERC was its belief that the Commission's power would be curtailed in the Mid-Columbia proceeding. App. 14.

This purported inability of the Commission to add fish protection measures at a later time is the linchpin of the court of appeals' holding that FERC violated the Federal Power Act, its own regulations, the Fish and Wildlife Conservation Act and the Pacific Northwest Electric Power Planning and Conservation Act. The court's holding that "FERC must consider fishery issues *before*, not after, issuance of a license," App. 10 (em-

phasis in original) is not supported by any of the case authority[11] or legislative history[12] which it cites. Neither Chelan nor FERC contested the fact that the Commission must consider fish issues. The authority relied upon by the Ninth Circuit does not prohibit the procedure adopted by FERC of issuing a new license with the condition that further fish measures could be included once the necessary studies were completed.

Indeed, FERC's interpretation of the statute is further buttressed by the legislative history surrounding a proposed amendment to the Federal Power Act in 1968. The proposed amendment would have permitted the Commission to review licenses during their term and modify project operations, if necessary. The House Interstate and Foreign Commerce Committee deleted the provision as "unnecessary in light of the . . . Commission's power to insert so-called open end[ed] conditions in hydroelectric power project licenses." H.R. Rep. No. 1643, 90th Cong., 2d Sess. at 2.[13] Congress thus recognized and ratified the

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[11] For instance, *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), upon which the court heavily relied, App. 10-12, is clearly inapposite to the instant case. The language from *Scenic Hudson* quoted by the court of appeals refers to a determination by the FPC to refuse to admit certain testimony into evidence in a proceeding involving the initial licensing of an unconstructed project. Other than being support for the uncontroverted proposition that the Commission has the duty to make an inquiry into all relevant facts, *Scenic Hudson* has no bearing upon the validity of the procedure adopted in this case.

[12] The House Report quoted by the court, App. 9, is not inconsistent with the procedure adopted by FERC. In any event, its relevance is questionable given that it refers to "a license for a project subject to recapture. . . ." As the court acknowledged in the amendment to its opinion contained in the order denying FERC and Chelan's petitions for rehearing, the Rock Island Project is not subject to recapture.

[13] Later, during the consideration of the Bill on the House floor, all the Congressmen who participated endorsed a letter from the Commission as to the Commission's authority to impose "open

Commission's practice of issuing licenses with the understanding that all issues cannot always be resolved prior to license issuance, and that modifications may be necessary.

The Ninth Circuit's position in this case is also inconsistent in principle with the District of Columbia Circuit's decision in *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983). Interpreting the same provision in question here, section 6 of the Federal Power Act, 16 U.S.C. § 799, the court stated that:

> FERC's power to limit license agreements and to reserve the right to require future alterations enables the Commission to accord section 6 the scope its terms indicate without unreasonably undermining the [Federal Power Act's] broader purpose set out in Section 10(a). FERC has discretion under section 6 to restrict license terms . . . and is also authorized to impose additional license conditions at its discretion.

Id. at 83-84.

Although arising in a somewhat different factual context,[14] the instant case is also inconsistent with the D.C. Circuit's recognition in *Swinomish Tribal Community v.*

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ended" conditions. That letter stated, 114 Cong. Rec. at 21440-21441 (July 15, 1968):

> In recent years the Commission, aware that it is unable, at the time of license issuance, to solve all of the problems that subsequently may have to be met if comprehensive development is to be maintained, has imposed . . . limited subject open end[ed] conditions . . . . Typical . . . conditions related to water releases, joint use of project reservoirs and properties . . . coordination of project operation both electrically and hydraulically with other projects . . . and construction . . . of facilities for the conservation . . . of fish and wildlife . . . .

[14] The application in issue was for a license amendment rather than for a new license, and the proposal that minimum flow requirements be attached to the license was not made until after issuance of the FERC's opinion.

FERC, 627 F.2d 499 (D.C. Cir. 1980), of the propriety of FERC's use of a separate proceeding to consider fish issues. The court stated that "the Commission's action in instituting a separate proceeding to consider the matter of downstream flow releases was well within the agency's discretion," *id.* at 510 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)).

Even the Ninth Circuit has previously recognized the Commission's authority to use reopener clauses to impose further conditions upon a licensee. In *California v. FPC*, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965), the Commission issued a fifty-year license containing a "reopener clause" concerning minimum stream flows that might be imposed by the Commission after the first twenty years of operation. The licensees challenged this provision on the ground that it violated Section 6 of the Act, 16 U.S.C. § 799, the same provision in question in the instant case. The Ninth Circuit rejected the licensees' argument in language which is equally applicable to this case:

> The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees' right to test the validity of any future action.

345 F.2d at 924-25.

The Ninth Circuit reasoned in this case that licensee consent is a prerequisite to the imposition of post-license issuance conditions. However, the extent of the Commission's power to impose conditions and of Chelan's "right to test the validity" of any conditions the Commission might seek to impose are the same whether in the context of issuance of a license for another fifty year term or in a separate proceeding to modify the project upon completion of the ongoing fish studies. The court's effort to distinguish its *California v. FPC* decision on the ground that the license in that case did contain some fish measures cannot withstand scrutiny, particularly since, in the instant case, there are also fish protection measures which were added to the old license through the 1974 amendment [15] and were incorporated into the new license. Moreover, under the Ninth Circuit's reasoning in this case that FERC must obtain a licensee's consent to any modifications, the reopener clause provision in the *California* case would have been without effect, regardless of what other provisions were contained in the original license.[16]

This Court has frequently stated that administrative agencies should be permitted "to pursue methods of inquiry capable of permitting them to discharge their multi-

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[15] The bulb turbines installed at the second powerhouse have a substantially different design from the Kaplan turbines at other Columbia River projects and cause significantly fewer fish mortalities. A structural bypass, which permits some downstream migrants to circumvent the turbines, was also installed pursuant to the 1974 amendment. Thirdly, a new fish ladder was also constructed. See App. 84.

[16] In contrast to the court's belief that FERC's power to modify licenses is limited in the case of new licenses, the court appeared to believe that the Commission could use the "reopener clause" to insert new conditions into annual licenses and that the Commission should have used the vehicle of annual licenses until fish protection studies were completed. App. 13. This position is lacking in logic or support of any kind.

tudinous duties," *e.g.*, *FCC v. Schrieber*, 381 U.S. 279, 290 (1965) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)), and has often admonished the courts of appeals "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978). Although an administrative agency's discretion in structuring its proceedings may be circumscribed by statute, the result reached by the Ninth Circuit is not required by the Federal Power Act. The decision that FERC may not use reopener clauses to impose additional conditions upon completion of comprehensive proceedings such as Mid-Columbia accordingly constitutes an unwarranted intrusion upon FERC's ability to structure its own procedures.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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84-1365

FILED

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ALEXANDER L. STEVAS, CLERK

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. JUDICIAL AND ADMINISTRATIVE OPINIONS

A. Opinion Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-7561
82-7562
and 83-7038

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Petitioner,

MALCOLM BALDRIGE, Secretary of Commerce,
Petitioner,

NATIONAL WILDLIFE FEDERATION,
Petitioner-Intervenor,

and

WASHINGTON STATE DEPARTMENT OF FISHERIES and WASHINGTON STATE DEPARTMENT OF GAME,
Intervenors,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Intervenor.

On Review of an Order of the
Federal Energy Regulatory Commission
Argued and submitted December 8, 1983

OPINION

Before: ANDERSON and FLETCHER, Circuit Judges, and EAST,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

On November 23, 1982, the Federal Energy Regulatory Commission (FERC or Commission) upheld an order granting Chelan County Public Utility District No. 1 (Chelan) a new license for the operation of Rock Island Hydropower Project No. 943. The license is for a forty-year term. The National Marine Fisheries Service of the Department of Commerce (NMFS), the Washington State Departments of Fisheries and Game (Washington), the National Wildlife Federation (NWF), and the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima) petition this court for review. We grant the petitions, set aside the license, and remand to FERC.

I. BACKGROUND

A. *Facts*

The Rock Island Project was originally licensed on January 21, 1930 by the Federal Power Commission. The license authorized the construction of Rock Island Dam, the first dam to span the Columbia River. In 1952, Chelan became a joint licensee of the project and in 1980 became the sole licensee.

Rock Island originally had a single powerhouse. In 1974, the license was amended, allowing construction of a second powerhouse. The second powerhouse was completed in 1979 and has increased the generating capacity of Rock Island to 622.5 megawatts.

Rock Island is one of ten hydroelectric projects on the Columbia River. Six of those projects are federally owned and operated. Four, including Rock Island, are owned and operated by three public utility districts pursuant to license. These four projects utilize five dams and are

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* The Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

located next to one another on the middle stretch of the Columbia.

As with all dams, Rock Island has a significant impact on the environment, especially anadromous fish runs. In the Pacific Northwest, juvenile anadromous fish (chinook, coho and sockeye salmon, and steelhead trout) utilize the Columbia River and its tributaries to migrate to the Pacific Ocean where they mature. As adults, the fish travel the same route upstream to spawn. Rock Island Dam has fish ladders and other facilities to assist adult fish migrating upstream, but it has no comparable facilities to enable the juvenile fish to pass through or around the dam. The result is that a significant number of juvenile salmon and steelhead die either as a result of passing through the turbines or because of a phenomenon called "holding over." Holding over occurs when juvenile fish prematurely end migration because of the delays in traveling through impounded water and in trying to pass around a dam. It is the petitioner's concern with the effect of Rock Island Dam on juvenile fish which forms the basis of their appeal.

B. *Procedure*

The pertinent procedural background of this case begins in 1973 when Chelan applied for and subsequently received an amended license allowing it to construct the second powerhouse. 51 F.P.C. 1141 (1974). At that time, NMFS and Washington intervened and sought the construction of passage facilities for juvenile fish as a condition to the amended license. The Federal Power Commission (FPC), whose functions were transferred to the Federal Energy Regulatory Commission in 1977, did not impose the conditions. Instead, it added "Article 48" to the license which required Chelan to conduct studies in conjunction with federal and state fishery agencies on the effects of the project on the fishery. The result of these studies was to be a revised "Exhibit S" (fish and

wildlife report). This report was to be submitted three years after the second powerhouse was operational. Also, Article 21 of the amended license contained a "reopener" clause which reserved to FERC the right to require modification of the dam's facilities and operations as deemed reasonable and necessary for the development of fish and wildlife resources.

In 1976, Washington petitioned the Commission to modify operations at the Priest Rapids Dam, which is two dams below Rock Island on the Columbia. Similar petitions were filed requesting the modification of operations at four other dams, including Rock Island. All these petitions sought the amendment of existing licenses in order to implement fish protection measures. These five dams are operated by three local public utility districts, including Chelan. In 1979, the Commission consolidated these petitions into a single action, the Mid-Columbia Proceeding. 6 F.E.R.C. ¶ 61,210.

The Commission divided the Mid-Columbia Proceeding into two phases. In Phase I, the Commission ordered an expedited hearing to consider any interim measures necessary to protect the Spring 1979 downstream migration of smolts. In Phase II, the Commission ordered that the usual procedures be followed to reach a long-term solution to the anadromous fish problem. In late 1979, the parties to the Mid-Columbia Proceeding (NMFS, Washington, Oregon Department of Fish & Wildlife, Idaho Department of Fish & Game, Chelan, and the other two licensees) proposed an interim settlement agreement for Phase II. FERC approved the settlement in March, 1980. 10 F.E.R.C. ¶ 61,257. It provides for minimum flows and spills at designated times until 1984. In the meantime, a five-year study investigating a variety of fish protection measures was to commence. Importantly, the Commission recognized the inconclusive nature of the settlement, stating that it "is obviously an interim measure designed to

gather data rather than a final resolution of appropriate flows."

In 1977, Chelan applied for a new license, its original fifty-year license being due to expire in January, 1980. In July, 1978, FERC issued its public notice of the application and asked interested parties to comment or intervene by September 18, 1978. NMFS and Washington petitioned to intervene, each noting that further studies were necessary to gauge the effect of the recent modifications to Rock Island and that fish protection measures should be incorporated into the new license. FERC granted intervention.

In January, 1980, and January, 1981, FERC issued annual licenses pending its final decision. Then, on May 13, 1981, the Director of the FERC Office of Electric Power Regulation issued a new license to Chelan, allowing it to continue operation of the project for another forty years. 14 F.E.R.C. ¶ 62,187. Apparently, NMFS and Washington had not been contacted again by FERC after being granted leave to intervene. Also, no hearings were ever held on the relicensing question.

The Director was of the opinion that FERC's obligations to consider fishery issues were being fulfilled by the related Mid-Columbia Proceeding. He noted that the new license contained a "reopener" clause which would permit FERC to impose any necessary fish protection measures once the continuing studies under the Mid-Columbia Proceeding were completed, as well as those done to complete the Revised Exhibit S. Finally, the Director found that no environmental impact statement was required prior to licensing because the continued operation of the project did not involve any changes in the status quo.

NMFS appealed the order to the Commission. Yakima joined in the appeal. The National Wildlife Federation filed a separate petition appealing the order. Washington

joined later in NMFS's appeal. The petitioners claimed that the order failed to comply with the Federal Power Act (FPA), the Fish and Wildlife Coordination Act (FWCA), the Pacific Northwest Power Planning & Conservation Act (PNPA), the National Environmental Protection Act (NEPA), and Commission regulations. In essence, petitioners claim that fishery issues must be considered prior to licensing and that they may not be deferred to a separate proceeding. Without a hearing, FERC issued its order on appeal, rejecting NWF's and Washington's appeal as untimely and affirming the Director's opinion that fishery measures could be implemented in the license once the Mid-Columbia Proceeding and the Revised Exhibit S were completed. 19 F.E.R.C. ¶ 61,223. The petitioners requested a rehearing and on November 23, 1983, the Commission again rejected their claims. 21 F.E.R.C. ¶ 61,264. The petition for review to this court followed.

II. JURISDICTION

NMFS, having filed a petition for review in this court within sixty days of the denial of its application for rehearing by the Commission, is properly before this court. 16 U.S.C. § 825*l*(b). Chelan and Washington were granted leave to intervene in the appeal pursuant to Fed. R. App. P. 15(d). No one contests the order granting intervention to these interested parties.

Yakima and NWF also filed timely petitions for review. FERC argues that this court must dismiss these petitions because NWF and Yakima failed to intervene in the license proceeding prior to issuance of the license order. Neither NWF nor Yakima qualify, FERC states, as a "party to a proceeding under this chapter aggrieved by an order issued by the Commission," 16 U.S.C. § 825*l* (b), entitling them to seek review in this court.

We disagree. Under the regulations then in force, any "interested person" could appeal staff action. 18 C.F.R.

§ 7(d) (1981). Both Yakima and NWF appealed the Director's license order to the full Commission and there is no question they qualified as "interested parties."

FERC also argues that, in any event, Yakima's and NWF's appeals of the license order to the Commission were untimely. The license order was issued on May 13, 1981. Interested persons had thirty days in which to appeal to the FERC. *Id.* NMFS moved for an extension of time to appeal. The motion was granted, allowing filing an appeal to and including July 13, 1981. On June 22, Yakima asked permission to join in the extension of time. This motion was never expressly addresesd by FERC. Yakima then filed a timely joint appeal with NMFS. FERC considered the issues raised by Yakima in its order on appeal. Under these circumstances, we must conclude that Yakima qualifies as a party to the FERC proceeding and therefore is entitled to be before this court.

Although NWF's situation is more questionable, we need not decide whether its petition for review before this court in No. 82-7562 was timely since its motion to intervene in the appeal to this court was granted in No. 82-7561. NWF is an interested entity and pursuant to a prebriefing conference order it briefed one issue that had been properly raised before the Commission and that was before this court in Nos. 82-7561 and 7038. Neither the court nor the parties would be deprived of briefing on any of the substantive issues nor would any parties' rights be prejudiced were NWF's petition dismissed. Accordingly, we dismiss NWF's petition for review as moot.

III. FERC'S STATUTORY OBLIGATIONS ON RELICENSING

The issue in this case can be stated rather simply: Can the Commission satisfy its obligations under the relevant statutes by deferring consideration and imple-

mentation of fishery protection measures until after licensing? While we are sympathetic with FERC's stated practical desire to resolve the fishery questions in a comprehensive proceeding covering all five of the Mid-Columbia Dams, we hold that the statutes require FERC to examine fishery issues before issuance of a license.

No factual questions are involved in this case. Only questions of law are presented, which generally receive *de novo* review. However, an agency interpretation of the statute it administers is entitled to deference to the extent the interpretation is reasonable and comports with the intent of the statute. *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473 (9th Cir.), *cert. denied*, —— U.S. —— (1983); *see City of Centralia, Washington v. FERC*, 661 F.2d 787, 790 & n.8 (9th Cir. 1981).

A. *Statutory Obligations to Consider Fishery Issues Prior to Licensing*

NMFS asserts, and FERC does not dispute, that under the Federal Power Act FERC must make the same inquiry into fishery issues in relicensing as required when initially licensing a project. Section 15(a) of the FPA, 16 U.S.C. § 808(a), governs license renewals and provides that "the [C]ommission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee" if the United States does not exercise its right to take over the project at the expiration of the original license. No federal take-over is involved in this action and no new entity is seeking the right to operate Rock Island.

Section 15 and the related federal take-over provision, section 14, 16 U.S.C. § 807, were amended in 1968. *See* Pub. L. No. 90-451 §§ 2, 3, 82 Stat. 617 (1968). The

house report on the amendments makes it plain that Congress intended the Commission to make the same inquiries on relicensing as on initial licensing:

> It provides that the Commission, no earlier than 5 years before the expiration of a license for a project subject to recapture, shall entertain applications for a new license. Just as in the case of original licensing the controlling criteria would be the comprehensive development standard of section 10(a) of the Federal Power Act. In view of this fact the relicensing proceeding would be deemed to involve "initial licensing" within the context of the Administrative Procedure Act rather than "license renewal."

H.R. Rep. No. 1643, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3081, 3084. The proposed amendments were submitted to Congress by the Chairman of the Federal Power Commission, Lee C. White. His letter, incorporated into the house report, confirms and supports the report's interpretation of the Commission's duties on relicensing, and notes that in addition to power production, comprehensive development includes the consideration of fish and wildlife conservation, among other public uses. *Id.* at 3089.

In turn, section 10(a), 16 U.S.C. § 803(a), requires the Commission to consider all beneficial public uses when it grants a license. In pertinent part, this subsection conditions the grant of a license on the determination that the project

> will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. . . .

In *Udall v. FPC*, the Supreme Court recognized that the examination of fish and wildlife resources is mandated

as part of the consideration of "recreational purposes." *See* 387 U.S. 428, 440 (1967). As stated by the Court:

> The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including . . . the preservation of anadromous fish for commercial and recreational purposes. . . .

Id. at 450; *see also California v. FPC*, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

The law, then, is well defined: Prior to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures. It is undisputed that in this proceeding the FERC did not undertake this obligation prior to issuing the license. Instead, it deferred full consideration of fish protection in two ways. First, it did not require Chelan to submit an "Exhibit S" (fish and wildlife report) as part of its application nor prior to issuance of the license, as required by FERC regulation. 18 C.F.R. § 4.41 (1981). This exhibit is the primary method used by the Commission to study the project's effect on wildlife (see Part B, *infra*). Second and most critically, it deferred study and resolution of fish protection issues to the Mid-Columbia Proceeding. FERC argues that deferring consideration of fishery issues is well within its discretion. The statute and the gloss put upon it by the courts warrant another conclusion. FERC must consider fishery issues *before*, not after, issuance of a license. *Udall*, 387 U.S. at 450; *see Scenic Hudson*, 354 F.2d at 620.

FERC cites *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-544 (1978) as support for the proposition that an agency has discretion to modify its

procedures such as done in this case. The opinion in *Vermont Yankeee*, recognized, however, that such discretion may be circumscribed by statutory mandate. *Id.* at 549 n.21. As stated, the statute requires that public interest concerns be evaluated as a *condition* to licensing.

Cases discussing the environmental impact statement requirements of the National Environmental Policy Act, 42 U.S.C. § 4332, are instructive. In *Cady v. Morton*, 527 F.2d 786, 794 (9th Cir. 1975), the court stated that "the filing of an EIS should precede rather than follow federal agency action. . . ." (citations omitted). The rationale behind this rule is that inflexibility may occur if delay in preparing an EIS is allowed: "After major investment of both time and money, it is likely that more environmental harm will be tolerated." *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979).

We see no reason why the law should be different under the Federal Power Act. The FPA imposes obligations similar to NEPA. In essence, the court reviews the license with particular concern to see that the Commission has fulfilled all its procedural obligations that must be undertaken prior to its issuance. In this case those procedural obligations include, among other things, prelicensing consideration of fishery issues. In *Scenic Hudson*, 354 F.2d 608, the Second Circuit was presented with an analogous situation involving the correct review of the Commission's decision to license a hydropower project. The court overturned the license on the basis the Commission failed to fully study alternatives to the proposed project and possible fish protection measures as part of its determination the license would be in the public interest. We agree with *Scenic Hudson*'s discussion of the court's reviewing function:

> This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has

> correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.

354 F.2d at 620 (citations omitted); *cf. California v. FPC*, 345 F.2d 917 (9th Cir. 1965) (license upheld where FPC gave fishery issues due consideration).

FERC argues that the procedure it is utilizing for Rock Island best comports with its statutory mandate to consider the "comprehensive" picture in its decision to license. *See* 16 U.S.C. § 803(a). Deferral to the Mid-Columbia Proceeding, FERC states, serves this goal because in it fish protection measures for five dams on the central Columbia River are being studied simultaneously. We agree it is important that fishery issues be addressed with a view to the total system: Storage and spill of one dam necessarily affects the operation of other dams. We do not agree, however, that this makes FERC's procedure in this case proper. First, as we have repeated, the statute and the cases construing it require prelicensing consideration of fishery issues. Second, Section 15(a) of the FPA, 16 U.S.C. § 808(a), expressly provides for the issuance of annual licenses to the prior licensee if the license expires pending the relicensing determination. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d 198, 206-207 (D.C. Cir. 1975). In fact, FERC issued annual licenses to Chelan in 1980 and 1981. Clearly, it could have continued to do so if it wished to incorporate the results of the Mid-Columbia Proceeding in the new license. Through an annual license the status quo would have been maintained. *Id.* No harm would accrue to the licensee, as annual licenses must incorporate the terms of the prior license. 16 U.S.C. § 808(a).

We also find FERC's reliance on *California v. FPC*, 345 F.2d 917 (9th Cir. 1965), misplaced. That case does not stand for the proposition that FERC may defer fishery issues for later resolution. Unlike here, in *California* the Commission undertook extensive studies of the effect of the New Don Pedro Dam on the Tuolumne River fishery prior to issuance of the license. Specific fish protection measures were incorporated into the license. *Id.* at 921. The license also included a "reopener clause" which gave the Commission the right to modify those conditions in twenty years if further study warranted it. This court upheld the Commission's use of the reopener clause. *Id.* at 924-925. Simply because the new Rock Island license contains a similar clause, reserving FERC the right to incorporate the results of the Mid-Columbia Proceeding, does not mean *California* allows FERC to issue a license before consideration of fishery issues.

We also find unpersuasive FERC's argument that the procedure it used offers more protection for the fishery than simply issuing annual licenses. This argument is based on FERC's incorporation of the Mid-Columbia settlement agreement's minimum stream flow conditions into the new Rock Island license. The same protections could have been added to an annual license. An annual license must contain the same terms as the expired license, 16 U.S.C. § 808(a), but the Rock Island license, as amended in 1974, contained a "reasonable modifications" clause in Article 21. The Mid-Columbia Proceeding interim settlement agreement could have been incorporated through that clause.

While we see no substantial benefit from the procedure used by FERC, we do see a distinct possibility for harm resulting from utilization of a procedure designed to impose fish protection measures in a modification proceeding. First, a modification proceeding is not the same as a relicensing proceeding. Subject to the requirement that its decision be in the public interest, the Commission has

broad discretion to impose fish protection conditions when it issues a new license. Notwithstanding a reopener clause, FERC may not "amend" a license in a modification proceeding without the licensee's consent. 16 U.S.C. § 799. Plainly, therefore, the Commission's discretion is curtailed in a modification proceeding. Also, as a practical matter, the method used by FERC here removes the incentive for a speedy and efficient resolution of fishery issues. If these issues must be examined and resolved prior to licensing, the licensee has an incentive to submit all the required data as quickly as possible. The same incentive is not present in the procedure used here where fishery issues are deferred to the future. The licensee may very well attempt to forestall the imposition of protection measures because these might affect the project's power production. *See Environmental Defense Fund v. Andrus*, 596 F.2d at 853.

On the basis it violated the Federal Power Act, we reverse the order granting Chelan's license to operate Rock Island Dam and remand to the Commission. Our resolution of this case on the FPA question makes it unnecessary to discuss the Pacific Northwest Electric Power Planning & Conservation Act (PNPA) and the Fish and Wildlife Coordination Act (FWCA), in detail.

We note briefly that these acts place additional mandates on the Commission in a relicensing proceeding. The purpose of the FWCA is to ensure that "wildlife conservation shall receive *equal consideration* and be coordinated with other features of water resource development programs. . . ." 16 U.S.C. § 661 (emphasis added). "Equal consideration" is insured through the requirement that FERC and other agencies responsible for management of natural resources consult with federal and state wildlife agencies prior to authorizing a project. 16 U.S.C. § 662; *see Udall v. FPC*, 387 U.S. at 443-444. The PNPA is specifically directed to the Columbia River system and, unlike the FWCA, it imposes substantive as

well as procedural obligations on FERC. In pertinent part, it requires federal agencies responsible for managing hydropower projects on the Columbia system to

> exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides *equitable treatment* for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.
> . . .

16 U.S.C. § 839b(h)(11)(A)(i) (emphasis added). One purpose of the PNPA is to place fish and wildlife concerns on an equal footing with power production. H.R. Rep. No. 976 (Part I), 96th Cong. 2d Sess. 49, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5989. In this respect, the PNPA supplements the Federal Power Act. *Id.* at 57. We have no doubt that if FERC failed its Federal Power Act obligation to consider fishery issues prior to licensing, it concomitantly failed to meet its obligation to give fish "equal consideration" under the FWCA and "equitable treatment" under the PNPA.

B. *The Exhibit S and Consultation Requirements*

NMFS also argues that FERC violated its own regulations when it issued the license before Chelan had submitted "Exhibit S," a report on the projected effect of the dam on fish and wildlife resources. NMFS, as well as the other petitioners, makes a related claim that FERC violated its duty to consult with fishery agencies and Indian tribes prior to license issuance. We agree, notwithstanding FERC's assertion that it has the discretion to modify the filing requirements in its regulations.

At the time of Chelan's application for a new license, 1977, FERC regulations provided that "there shall be

filed as part of an application for license the following exhibits." What follows is a list, including Exhibit S, which is

> a report on the effect, if any, of the project upon the fish and wildlife resources in the project area or in other areas affected by the project and proposals for measures considered necessary to conserve and, if practicable, to enhance fish and wildlife resources affected by the project. The exhibit shall include functional design drawings of any fish ladders proposed to be constructed in compliance with section 18 of the Federal Power Act, such other facilities or developments as may be necessary for the protection, conservation, improvement and mitigation of losses of fish and wildlife resources in accordance with section 10(a) of the Act, and cost estimates for such facilities and developments. The Applicant shall prepare this exhibit on the basis of studies made after consultation and in cooperation with the U.S. Fish and Wildlife Service, Department of the Interior, and appropriate state fish and wildlife agencies and in the case of public lands, advise Federal agencies having jurisdictional responsibilities therefor of its proposed plans. The exhibit shall include a statement on the nature and extent of Applicant's consultation and cooperation with the above agencies. To the extent those aspects of fish and wildlife related to recreation are covered in Exhibit R, a specific reference to Exhibit R will suffice.

18 C.F.R. § 4.41 (1976).

It is a well-known maxim that agencies must comply with their own regulations. *E.g., Memorial, Inc. v. Harris*, 655 F.2d 905, 910-911 n.14 (9th Cir. 1980). We do not agree with FERC's claim that Exhibit S is the type of filing requirement that an "agency may relax, modify or waive . . . ." *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 242 (D.C. Cir.), *cert. denied*,

449 U.S. 1061 (1980) (citations omitted). Exhibit S is plainly designed to facilitate FERC's *duty* to consider fishery issues prior to licensing. This is not the same as the situation in *Papago*, which involved the reviewability of an order rejecting a motion to overturn a rate filing for patent defects. The *Papago* court found the order nonreviewable because it involved a requirement that was an aid to the Commission's exercise of its discretion over the decision to accept a rate filing. Exhibit S, however, is tied to FERC's obligation to investigate fishery matters prior to licensing. Also, this is not a situation where the parties are contesting the adequacy of the report—none was filed. No alternative method of consideration of fishery information was utilized.

The Exhibit S report is directly related to FERC's duty of consultation. The FWCA and the PNPA each require FERC to consult with fishery agencies and, in the case of the PNPA, Indian tribes prior to licensing. 16 U.S.C. § 662(a) (FWCA); 16 U.S.C. § 839b(h)(11)(B) (PNPA). Exhibit S aids that obligation because it is to be prepared by the applicant "on the basis of studies made after consultation and in cooperation with the U.S. Fish and Wildlife Service, Department of the Interior, and appropriate state fish and wildlife agencies." 18 C.F.R. § 4.41 (1981). The report must also include statements on the nature and extent of the cooperation and consultation between the applicant and the agencies. *Id.*

It is not enough the FERC gave notice of Chelan's application to the agencies and Indian tribes. The consultation obligation is an affirmative duty. Also, it is safe to say that the respective fishery agencies believed the consultation process would take place in the preparation of Exhibit S. Instead, however, FERC issued the license before the exhibit was submitted.

The Commission argues that it was proper for it to defer the Exhibit S report pending the completion of

additional studies. Additional studies are necessary, FERC states, because the full impact of the modifications authorized at Rock Island in 1974 have not yet been sufficiently analyzed. That may well be true. But to the extent those studies are necessary, FERC did not have to issue the permanent license when annual licenses could have been used pending their completion.

The Exhibit S and consultation requirements are the primary means by which FERC is to comply with its duty to examine fishery issues prior to licensing. FERC's failure to follow those requirements further supports reversing the license order and remanding to the Commission.

C. *Environmental Impact Statement*

NMFS also argues that FERC was required to prepare an environmental impact statement (EIS) prior to relicensing Rock Island Dam. We agree.

Having been built in the 1930's, Rock Island predated the National Environmental Protection Act (NEPA) and its requirements for preparation of impact statements for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). An EIS was, however, prepared in 1974 when the modifications to the dam were proposed. The question before us is whether an EIS is required prior to the decision to relicense the project. Surprisingly, we have found no cases which have addressed this issue in the context of relicensing hydropower projects by FERC.

"[A]n agency's determination that a particular project does not require the preparation of an EIS is to be upheld unless unreasonable." *Foundation for North American Wild Sheep v. Department of Agriculture*, 681 F.2d 1172, 1177 (9th Cir. 1982) (footnote omitted) (citing *Portela v. Pierce*, 650 F.2d 210, 213 (9th Cir. 1981); *City & County of San Francisco v. United States*, 615

F.2d 498, 500 (9th Cir. 1980); *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975)). We may conclude the agency acted unreasonably if substantial questions are raised concerning whether the project may significantly affect the quality of the human environment. *Id.* at 1178.

There is no doubt that if this action involved the decision to license new construction of a hydropower project such as Rock Island, an EIS would be required. *See Green County Planning Board v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). FERC argues that this situation is different because the dam has been in operation for fifty years. FERC relies on cases which hold that when there will be no change in the status quo, such that the action is simply "a phase in an essentially continuous activity," no EIS is necessary. *City & County of San Francisco*, 615 F.2d at 501; *see Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-117 (9th Cir. 1980); *cert. denied*, 450 U.S. 965 (1981); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979); *cert. denied*, 445 U.S. 915 (1980); *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1217-1218 (9th Cir. 1979). Rock Island was relicensed under the same terms as the prior license and therefore FERC argues that there has been no change in the status quo. Viewed narrowly, relicensing fits within the FERC's characterization and comports with the cases cited above: *Burbank Anti-Noise Group* (no EIS is required when federal government aided the purchase of an existing airport by private group); *City & County of San Francisco* (no EIS required when Navy leased, with essentially the same terms as the prior lease, an existing shipyard to a private firm); *Committee for Auto Responsibility* (lease of existing parking lot to private firm did not change the status quo); *Westside Property Owners* (formalization after enactment of NEPA of long-existing agreement and program between

Germany and United States to train German pilots did not require EIS).

NMFS characterizes relicensing as much more than a phase in continuous activity. Because of the procedures required on the decision to relicense, the purposes of relicensing, and the irreversible commitment of a water resource if relicensing is upheld, we agree.

A primary relicensing consideration for FERC is whether it should recommend to Congress recapture (or takeover) by the United States. 16 U.S.C. § 807. No one argues that the United States should take over Rock Island, but the need for this inquiry is a strong indication that FERC should have at its disposal all pertinent information, including that provided in an EIS.

If the United States does not exercise its right of takeover, the "[C]ommission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under then existing laws and regulations." 16 U.S.C. § 808(a). As discussed earlier, the decision to relicense is to be based on the same inquiry as original licensing, including a consideration of all relevant harms and benefits to public uses related to the project. The Commission must determine whether any changes in operations are required by "then existing" law and has full authority to impose such changes.

The Commission must also determine whether a non-power license should be issued. 16 U.S.C. § 808(b). Non-power licenses may be issued at the motion of an interested party or on the Commission's own motion. Seemingly, the Commission would determine that a non-power license is necessary if it concluded that power production needs were outweighed by recreation or environmental considerations.

Both the consideration of what conditions to attach to a new license and the questions involved in determining

whether a non-power license is necessary necessitate the information prepared in an environmental impact statement.

The purposes of the procedure imposed by Congress on relicensing underscore the necessity for an EIS. As the Commission stated when it proposed the amendments to the relicensing procedures in 1968:

> The Congress limited the maximum term of any license issued by the Federal Power Commission to 50 years and thereby preserved for the Nation, acting through subsequent Congresses, a full opportunity to reevaluate the best use of each project upon expiration of the license. We now recommend that Congress fix appropriate procedures for the reevaluation of each project in light of contemporary and prospective public needs.

Letter from Lee C. White, *supra*, at 3086. Thus, the Federal Power Act contemplates much more than a mere continuation of the status quo when the decision is made to relicense. Relicensing is substantially equivalent to issuing an original license and one would assume that the FERC regulations governing the preparation of an EIS generally apply. *See* 18 C.F.R. §§ 2.80, 2.81 (1981).

Relicensing, then, is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo. *See Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979); *Port of Astoria v. Hodel*, 595 F.2d 467, 477-478 (9th Cir. 1979). Simply because the same resource had been committed in the past does not make relicensing a phase in a continuous activity. Relicensing involves a new commitment of the resource, which in this case lasts for a forty-year period. *See Hodel*, 595 F.2d at 477.

Nevertheless, FERC argues that it has not violated NEPA because the only environmental fact in question

is fish protection and that question is being addressed in the Mid-Columbia Proceeding. As noted above, however, an EIS must be prepared before a project is approved, and the Mid-Columbia Proceeding does not satisfy that obligation. *See Environmental Defense Fund v. Andrus*, 596 F.2d at 853; *Cady v. Morton*, 527 F.2d at 794 & n.4.

In sum, we conclude that the FERC acted unreasonably when it issued the license to Chelan without first preparing an EIS.

IV. INDIAN FISHING RIGHTS

Yakima contends that the licensing violated its treaty fishing rights. Yakima states further that a resolution of the statutory issues may make it unnecessary to reach this issue. We accept Yakima's offer to defer consideration of this question until there is a subsequent appeal, if any, after our remand to FERC. We believe it proper for FERC to be first to address Yakima's claims after development of a full record. *See FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 332-333 (1976).

V. CONCLUSION

The Commission failed to meet its statutory obligation to consider fishery issues prior to licensing. It also unreasonably failed to prepare an EIS prior to licensing. Accordingly, the

PETITION FOR REVIEW IS GRANTED and the ORDER IS SET ASIDE.

B. FERC Orders Below

14 FERC ¶ 62,187

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project No. 943

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY

ORDER ISSUING NEW LICENSE (MAJOR)

(Issued May 13, 1981)

Public Utility District No. 1 of Chelan County (Chelan) filed an application for a license under Part I of the Federal Power Act (Act) for the continued operation and maintenance of the Rock Island Project No. 943.[1] The project is located on the Columbia River, a navigable waterway of the United States, in Chelan and Douglas Counties, Washington, and occupies lands of the United States.

Notice of the application has been published and comments have been received from interested Federal, State, and local agencies. The Washington Department of Fisheries, the Washington Department of Game, and the National Marine Fisheries Service were granted intervention. The significant concerns of the intervenors and commenting agencies are discussed below.

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[1] Authority to act on this matter is delegated to the Director, Office of Electric Power Regulation under 18 C.F.R. § 375.308 (1980), *as amended by* 46 Fed. Reg. 14119 (1981).

Project Description and History

The Federal Power Commission issued a license on January 21, 1930, to the Washington Electric Company for the construction and operation of the Rock Island Project No. 943. On June 30, 1931, the license was transferred to the Puget Sound Power and Light Company (Puget), and on July 31, 1952, the license was amended to include the Public Utility District No. 1 of Chelan County (Chelan) as a joint Licensee for the Rock Island Project. Puget was eliminated as a joint licensee by order issued July 17, 1980. In 1953, the project installed capacity was increased to a total of 212.1 MW, and in 1974, the authorized project installed capacity was increased to a total of 622.5 MW.

The constructed Rock Island Project consists of: 1) a 135-foot high and 2,524-foot long concrete gravity dam; 2) an 1,800-acre and 20-mile long reservoir, providing 130,000 acre-feet of gross storage; 3) the left bank powerhouse having a total installed capacity of 212.1 MW; 4) the right bank powerhouse having a total installed capacity of 410.4 MW; 5) six 115-kV transmission lines; and (6) appurtenant facilities. A more detailed project description is contained in ordering paragraph (B).

Safety and Adequacy

The project structures are safe against sliding and overturning under normal conditions of maximum headwater elevation 614.1 feet, normal tailwater elevation 571.6 feet (U.S.G.S. datum) plus earthquake loading of 0.1 g, and under flood conditions with headwater elevation of 619.5 feet and tailwater elevation of 606.2 feet. The San Francisco Regional Office reported that the project structures were in good condition and were generally well maintained. The most recent Part 12 Inspection Report also concluded that the project works were safe and adequate and made no recommendation with regard to safety of the project.

The spillway design flood is 960,000 cfs and the Probable Maximum Flood (PMF) at Rock Island is estimated to be 1,425,000 cfs. At the PMF, the Rock Island Reservoir would surcharge to about elevation 632 feet and the tailwater would be at elevation 623 feet. The differential between headwater and tailwater would be about 13.5 feet when discharging the spillway design flood of 960,000 cfs and about 9.0 feet when discharging the PMF of 1,425,000 cfs. In view of the comparatively small head differential and the insignificant amount of storage that would be released, there would be slight additional hazard to downstream areas in the event of failure of the dam during the occurrence of the PMF. The spillway is adequate.

The Board of Consultants, formed to monitor the construction of the second Rock Island powerhouse, met from May 13 to 15, 1980, for the final review of the engineering and construction of the project. In the final report, the Board recommended that the Licensee continue the structural monitoring plan, which provides for monitoring of dam alignment and settlement, uplift, relief drains both for flows and pressures, post-tensioned anchors, and for regular inspection of the "loose bolting" attachment of the trash racks. Article 41 requires the Licensee to continue the structural monitoring plan.

It is concluded that the project, under the conditions of this license, is safe and adequate.

Fish and Wildlife Resources

Anadromous fish migrating past the dam include chinook, coho, and sockeye salmon, steelhead trout, and Pacific lamprey. Fishways allow for the upstream migration of anadromous salmonids to their spawning areas in the upper reaches of the Columbia River and its tributaries.

The State of Washington Department of Fisheries (Fisheries), the State of Washington Department of Game

(Game), and the National Marine Fisheries Service (NMFS) are concerned with the effect of the project on the downstream migration of juvenile anadromous salmonids, on the upstream migration of anadromous fish, and on the limited fish spawning habitat within the project boundary. These agencies contend that reduced flows and insufficient spills from the project adversely affect juvenile salmonids by delaying the seaward migration through the reservoir, increasing predation, and increasing turbine mortality. Anadromous salmonids must also pass the project to reach upstream spawning and rearing areas. In addition, Fisheries and Game are concerned about the reduction in harvest of anadromous and resident fish species and the effects of the project on water quality.[2] Fisheries, Game, NMFS, and the U.S. Department of the Interior believe that mitigative measures to lessen the impacts of the project on anadromous salmonids and resident fish populations should be incorporated into any new license issued, and should include, among other things, land acquisition and habitat management for the benefit of wildlife species and the improvement of fishing opportunities at the project.

Hearings and settlement conferences in Docket No. E-9569 on the issues of minimum flows and of spills from the project necessary to protect juvenile anadromus fish resulted in the filing of a settlement agreement on December 31, 1979, which was approved by the Commission in March 1980. Pursuant to this agreement, Chelan, along with Douglas County PUD and Grant County PUD, is conducting studies to investigate the effect of the project on the downstream migration of juvenile salmonids, the methods of improving protection and natural production of salmonids, and the methods of improving and increasing semi-natural and artificial production of

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[2] The Washington Department of Ecology has issued a water quality certificate for the project, in accordance with Section 401 of the Federal Water Pollution Control Act.

salmonids from the Mid-Columbia River. Final reports will be submitted to FERC and applicable agencies for review.

Article 48 of the prior license required Chelan to conduct extensive pre- and post-flooding studies to determine the effects of the operation of the second powerhouse and of raising the reservoir level, on Columbia and Wenatchee River fish and wildlife. Studies will also determine the effectiveness of the fish passage facilities, the flow requirements for anadromous fish, and the extent of turbine mortality. Recreational fishing will be surveyed and water quality will be monitored. Seasonal wildlife use of project lands, the amount of wildlife-oriented recreation, and economic and social benefits derived from the consumptive and non-consumptive use of wildlife will also be assessed. A final report will compare pre-flooding and post-flooding conditions for fish and wildlife resources and recreational resource use, and will recommend any mitigative measures determined to be necessary.

The settlement agreement and the ongoing fish and wildlife studies adequately address the concerns of the intervenors and commenting agencies regarding the effects of the project on fish and wildlife resources. Article 38 requires the Licensee to file a revised Exhibit S within 3 years, taking into consideration the results of the pre- and post-flooding studies. Included in the revised Exhibit S would be any proposals for mitigative measures necessary to protect or enhance the fish and wildlife resources affected by the project.

Under Articles 12 and 15 of this license, the Commission reserves the right to prescribe minimum flow releases and other changes in project operation to preserve and enhance fish and wildlife resources.

Issuance of this license does not affect the ongoing consolidated proceeding identified as lead Docket No. E-9569.

Recreation

The primary recreational uses of the project reservoir are limited fishing, small boating, and water skiing. Existing recreational facilities include a controlled fishing pond, two boat launching ramps, and a small day-use park with a skating rink. In addition, a nine-hole golf course operated by the Town of Rock Island exists on lands owned by Chelan within the project boundary.

Chelan filed on September 29, 1975, and revised on March 1, 1978, an Exhibit R for the Rock Island Project pursuant to Article 55 of the prior License. The Exhibit R was approved by the Commission on October 19, 1979, requiring initial recreational development of six sites, and reserving two additional sites for future development. Proposed recreational development to be completed by 1984 includes: 30 campsites, 1 group camp, 165 picnic sites, 4 boat docks, 3 boat ramps, 2 interpretative centers, 1 swimming area, and 65 miles of shoreline trails.

The order approving the Exhibit R required Licensee to file for Commission approval, a plan for recreational development of the Wenatchee River Confluence North of Walla Walla Point sites. An amendment to the Exhibit R proposing development of the two sites was filed on October 20, 1980, and was approved on January 5, 1981.

The approved Exhibit R and amendment adequately fulfill current and foreseeable recreational needs at the project. This order makes the approved Exhibit R a part of the new License for Project No. 943. Article 17 of the License reserves sufficient authority for modification of the plan, including acquisition of lands to meet future recreational needs in light of changing conditions.

Cultural Resources

The Rock Island Railroad Bridge, Wenatchee Flat Site, and Pangborn-Herndon Memorial, all within the project

boundary, are listed on the National Register of Historic Places. The Rock Island Dam and Sternwheeler Park are listed on the State Register of Historic Places, and are within the project boundary. In addition, 26 archeological sites have been identified by the Washington State Historic Preservation Officer (SHPO) as being within the project boundary.

The SHPO recommends that Chelan develop a mitigation plan that addresses potential effects of the project on cultural resources. Article 52 of the prior license required the Applicant to do an archeological survey of the project area and perform any salvage work necessary to preserve the archeological values affected by construction of the second powerhouse and raising the reservoir level. Licensee's studies have been completed, but final reports have not been prepared. The final report will contain recommendations regarding further protection of archeological resources of the project area and will be submitted to the SHPO and the Commission for review. Article 39 requires the Licensee to continue to cooperate with the SHPO and Washington State University in order to ensure completion of any archeological work currently under way at the project and to ensure protection of the project's archeological resources, presently, and in the event of any future development at the project.

Other Environmental Considerations

On the basis of an environmental assessment, the Commission's staff found that licensing of the project would not be a major Federal action significantly affecting the quality of the human environment.

Issuance of this license will permit continued project operation, which began over 50 years ago. No new construction, except for recreation development, or change in project operation is proposed. The impacts of continued operation are discussed earlier in this order. Planned recreational facilities would be beneficial and their con-

struction would have impacts that are only minor and short-lived. On the basis of the record, including agency and intervenor comments and staff's independent analysis, it is found that issuance of a license for this project, as conditioned, is not a major Federal action significantly affecting the quality of the human environment.

Other Aspects of Comprehensive Development

The project, with a total installed capacity of 622.5 MW, has a hydraulic capacity of 220,000 cfs, which is the hydraulic capacity of the Rocky Reach plant located immediately upstream on the Columbia River. The project storage capacity is very limited, and therefore, power generation is dependent to a great extent on discharges from upstream powerplants.

Applicant has no plans for future expansion of the project, and development of the project for additional power is not economically justified at this time since the project is currently using the total flow discharged from upstream projects.[3]

The Columbia River is a navigable river. At the present time, there is no commercial navigation and no navigational facilities in the vicinity of this reach of the Columbia River. However, an investigation was conducted by the Seattle District, Corps of Engineers, and the results demonstrated that the potential installation of navigation locks is compatible with the Rock Island Project.

There are irrigation facilities utilizing waters from the Rock Island reservoir. The operation of the project has no adverse effect on these installations.

Continued operation of the Rock Island Project No. 943 is consistent with the comprehensive development of the

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[3] The project with its average annual generation of 2,780 million kWh, will utilize a renewable resource that will save the equivalent of approximately 4,565,000 barrels of oil or 1,287,000 tons of coal per year.

Columbia River. It is concluded that the project effectively utilizes the available head and flow of the Columbia River. Subject to the conditions of this license, Project No. 943 is best adapted to a comprehensive plan for development of the Columbia River basin for beneficial public uses, and issuance of this license is in the public interest.

License Term

Since there has been recent major construction at the project, which significantly increased the capacity, the license term will be 40 years from the end of the prior license.[4] Accordingly, this license will expire on January 31, 2020.

Revised Exhibits

Chelan filed on October 18, 1976, revised Exhibits J and K pursuant to Article 68 of Amendment 17 to the license to show the project boundary around the second powerhouse. Also, the Commission issued on October 19, 1979, an order approving Exhibit R, and issued on July 17, 1980, an order amending license for the Rock Island Project. Article 43 requires the Licensee to file revised Exhibits J and K, to supersede the Exhibits J and K filed October 18, 1976, and to reflect any changes in the project as a result of the orders issued October 19, 1979, and July 17, 1980.

It is ordered that:

(A) This license is issued to Public Utility District No. 1 of Chelan County, Washington (Licensee), of Chelan County, Washington, under Part I of the Federal Power Act (Act), for a period effective the first day of the month in which this license is issued and terminating January 31, 2020, for the continued operation and maintenance of the Rock Island Project No. 943, located in

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[4] *See* the Montana Power Company, Mystic Lake Project No. 2301, Order Issuing New License (Major) (Issued October 5, 1976).

Chelan and Douglas Counties, Washington, on the Columbia River, a navigable waterway of the United States, and occupying lands of the United States under the administration of the U.S. Bureau of Land Management. This license is subject to the terms and conditions of the Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Act.

(B) The Rock Island Project No. 943 consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, constituting the project area and enclosed by the project boundary. The project area and boundary are shown and described by certain exhibits that form part of the application for license and that are designated and described as:

Exhibit	FERC No. 943-	Showing
J	225	General Map-Project Area
K-1 to K-25	132 through 156	Detail Map-Project Area
K-S1 to K-S9	157 through 165	Survey Data-Project Area
K-T1	226	Detail Map-Transmission Line

(2) Project works consisting of:

(a) a concrete gravity dam, about 3,580 feet long, with a gated spillway section 1,184 feet long containing 31 crest gates; (b) a reservoir extending about 20 miles upstream having a normal maximum forebay elevation 614.1 feet U.S.G.S. and a gross storage capacity of 130,000 acre-feet and a usable storage capacity of 11,000 acre-feet at a maximum reservoir drawdown of 4 feet for power operations; (c) a concrete powerhouse about 870 feet long, integral with the dam, containing one 15,000-kW generating unit, three 20,700-kW generating units, and six 22,500-kW generating units (10 units totaling 212.1 MW); (d) a step-up substation on the powerhouse roof; (e) a high-tension switching station on Rock Island; (f) four single-circuit 115-kV transmission lines extending from the switching station for a distance of about two miles to the McKenzie switchyard; (g) a sec-

ond project powerhouse at the right bank about 465 feet long and 200 feet wide, containing eight 51.3-MW horizontal shaft, bulb-turbine type generator units (8 units totaling 410.4 MW); (h) step-up transformers at the second powerhouse connected to two single-circuit 115-kV transmission lines extending about two miles to the McKenzie-Valhalla substantion; (i) three fishways and related fish facilities; and (j) appurtenant facilities.

The location, nature and character of these project works are generally shown and described by the exhibits cited above and more specifically shown and described by certain other exhibits that also form a part of the application for license and that are described and designated as:

Exhibit L	FERC No. 943-	Titled
1	185	General Plan
2	186	Left Abutment Plan
3	187	First Powerhouse Plan
4	188	First Powerhouse Sections
5	189	First Powerhouse Main One Line Diagram
6	190	Spillway Dam
7	191	Second Powerhouse Plan
8	192	Second Powerhouse Section
9	193	Second Powerhouse Main One Line Diagram
10	194	Right Abutment Plan
11	195	Left Bank Fishway Sheet 1 of 2
12	196	Left Bank Fishway Sheet 2 of 2
13	197	Middle Fishway Sheet 1 of 2
14	198	Middle Fishway Sheet 2 of 2
15	199	Right Bank Fishway Sheet 1 of 4
16	200	Right Bank Fishway Sheet 2 of 4
17	201	Right Bank Fishway Sheet 3 of 4
18	202	Right Bank Fishway Sheet 4 of 4

Exhibit M—"General Description of Equipment" consisting of eleven typed pages filed on May 29, 1980, as part of the Application for New License.

Exhibit R—"Recreation Plan for Rock Island Project" consisting of 35 pages of text and 7 drawings (FERC Nos. 943-216 and -217, and -219 through -223) filed March 1, 1978, and approved October 19, 1979.

(3) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection with the project, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or approrpriate in the operation or maintenance of the project.

(C) Exhibits J, L, M, and R designated in ordering paragraph (B) above are approved and made a part of the license. Exhibit K is approved to the extent that it shows the general location and nature of the project.

(D) The application for approval of Exhibits J and K filed on October 18, 1976, is dismissed.

(E) This license is also subject to the terms and conditions set forth in Form L-5 (revised October, 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States," attached to and made a part of this license. The license is also subject to the following additional articles:

Article 38. The Licensee shall, within three years from the date of issuance of this license, file for Commission approval, a revised Exhibit S including "as-constructed" fishway drawings, prepared in accordance with the Commission's Rules and Regulations, and including among other things, the results of the pre- and post-flooding studies, and any proposals for mitigative measures needed

to protect and enhance the fish and wildlife resources affected by project operation.

Article 39. The Licensee shall continue to cooperate with the Washington State Historic Preservation Officer (SHPO) and with Washington State University to ensure completion of any archeological work currently underway at the project, and as required by the prior license. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the SHPO to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historic work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 40. The Licensee shall consult and cooperate with the Washington Department of Social and Health Services, and the Douglas County Planning Commission to determine what, if any, vector control measures are needed at the project.

Article 41. The Licensee shall carry out the recommendations for testing and monitoring of the project structures and equipment as set forth in the final report by the Board of Consultants dated May 15, 1980.

Article 42. The Licensee shall pay the United States the following annual charges, effective the first day of the month in which this license is issued:

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 830,000 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands other than for transmission line right-of-way, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The acreage of those lands is tentatively set at 33.53 acres. The Commission reserves the right to adjust this figure at a later date.

(c) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 0.07 acre of its lands for transmission line right-of-way, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 43. Within one year from the date of issuance of this order, the Licensee shall file for approval, revised Exhibits J and K conforming to § 4.41 of the Commission's regulations, showing the Rock Island Project No. 943 as constructed.

Article 44. (a) In accordance with the provisions of this article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of

use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State

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(c) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 0.07 acre of its lands for transmission line right-of-way, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

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(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State

and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modifications of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands sub-

ject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires

Project No. 943

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this Order, Public Utility District No. 1 of Chelan County, Washington this ——— day of ————, 1981, has caused its corporate name to be signed hereto by ————, its President, and its corporate seal to be affixed hereto and attested by ————, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ——— day of ————, 19—, a certified copy of the record of which is attached hereto.

By ————
President

Attest:

————
Secretary

(Executed in quadruplicate)

Form L-5
(Revised October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION

TERMS AND CONDITIONS OF LICENSE FOR CONSTRUCTED MAJOR PROJECT AFFECTING NAVIGABLE WATERS AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration,

addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof

has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is

transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of the said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: *Provided*, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commis-

sion reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for

such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity

for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of

the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided*, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the author-

ized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 22. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may be required to complete and maintain such navigation facilities.

Article 23. The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 24. The Licensee shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said

facilities are constructed by the Licensee or by the United States.

Article 25. The Licensee shall construct, maintain, and operate at its own expense such lights and other signals for the protection of navigation as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 26. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided,* That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 27. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation,

or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 32. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 33. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 34. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided*, That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further*, That in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.

Article 35. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 36. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 37. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

19 FERC ¶ 61,223

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler, III, Chairman;
Georgiana Sheldon,
J. David Hughes
and A.G. Sousa.

Project No. 943-011

PUBLIC UTILITY DISTRICT NO. 1 OF
CHELAN COUNTY, WASHINGTON

ORDER ON APPEAL

(Issued June 4, 1982)

On May 13, 1981, the Director of the Office of Electric Power Regulation ("Director") issued a new license to Public Utility District No. 1 of Chelan County, Washington ("Licensee") for the continued operation and maintenance of the Rock Island Project No. 943 located on the Columbia River in Chelan and Douglas Counties, Washington. (15 FERC ¶ 62,187). An appeal[1] of the Director's order was filed jointly by the National Marine

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[1] The National Wildlife Federation filed an untimely appeal and is therefore rejected. [18 CFR § 1.7(d) (1981).] The subsequent request for joinder and response to the Licensee's answer are also rejected.

Fisheries Service and the Yakima Indian Nation.[2, 3] The appeal addresses primarily question of the treatment of the fisheries resource and the lack of an environmental impact statement. The Licensee filed a response to the petition for appeal.

Motion to Strike

The Fisheries Service filed an answer to the Licensee's response to the petition. In response, the Licensee filed a motion to strike the answers. The Licensee argues that responses to answers are not permitted and that the pertinent issues had been presented in the earlier filings. The Fisheries Service argues in their response to the motion that although a response to an answer is not provided for in the regulations, it should not automatically be rejected. The Fisheries Service states that its filing completes the record.

There is no provision in our regulations for filing responses, or objections proffered in responses to a previously filed answer, response or objection. Except the extent that such a pleading represents a new prayer for relief or an initial response thereto, it will not be considered.[3] The answer filed by the Fisheries Service merely expand on or respond to arguments previously

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[2] The participants in the joint appeal will be referred to as "Fisheries Service". When an argument is made solely by the Yakima Indian Nation, it will be identified as such.

[3] The Washington Department of Fisheries and Game and the Oregon Department of Fish and Wildlife also requested that they be allowed to join in the joint appeal. Inasmuch as this request to join additional parties to the appeal was filed after the deadline for filing appeals, the request was untimely and is therefore denied. *See* 18 FERC § 1.7(d) (1981). We do note that denial of this the request does not alter the substance of the appeal that was timely filed.

[3] *Union Electric Company*, 18 FERC ¶ 61,156 (1982); *Southern California Edison Co., et al.*, 15 FERC ¶ 61,099 (1981).

presented. We are, therefore, granting the Licensee's motion to strike the response filed by the Fisheries Service to the Licensee's answer.

Fisheries Resource

The Fisheries Service states that the Director's order fails to adequately address its concerns with respect to the project's impacts on the anadromous fisheries resource. The Fisheries Service argues that the separate proceeding[4] is not sufficient to develop solutions to the problems. The Fisheries Service requests that a schedule be established for the installation of downstream bypass systems; that the minimum flows set forth in the settlement agreement be included in the license with reopener provisions; that provide [sic] compensation be provided for fisheries losses where such losses cannot be mitigated.

The Licensee states that the fisheries problems are being fully investigated in the separate proceeding and argues that severance of the fisheries question is an appropriate procedure. The Licensee questions the Fisheries Service approach of requesting separate consideration of the Rock Island Project when a system-wide approach would be more comprehensive.

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[4] We established a separate proceeding which consolidated for hearing and resolution the question of the effect of the operation of Project Nos. 2114, 943, 2145, and 2149 on the fisheries resource in the Columbia River. Public Utility District No. 2 of Grant County, Washington, *et al.*, Project No. 2114, *et al.*, "Order Consolidating Proceeding Establishing Hearing and Requiring Prehearing Conference (issued March 7, 1979). The interim results of that proceeding have been two settlement agreements: one for a period of four years concerning the study of flows to protect the Vernita Bar spawning area (approved October 15, 1979); and another for a period of five years to study the impacts of the projects on the downstream migrating fish and to develop solutions, if any, to lessen the impacts (approved March 20, 1980). The 1980 settlement agreement is the agreement referred to in this order.

The Director's order is correct in its statement that separate proceeding is addressing the concerns of Fisheries Service. The piecemeal approach advocated by the Fisheries Service would be costly and probably would not obtain adequate results. The problems demand a system-wide approach. That is why we ordered the separate proceeding. The question of by-pass systems at any of the dams is one to be addressed under the settlement agreement and, therefore, is currently pending before the presiding administrative law judge. The question of compensation for unmitigated losses is also pending before the presiding judge. The settlement agreement provides for interim minimum flows which the Licensee is bound to provide. Articles 12 and 15 of the license issued by the Director allow the Commission to impose minimum flows for the benefit of the fisheries resource and to change those flows should the need arise. Therefore, we believe that the inclusion of a license article on the interim minimum flow is not necessary. As we stated recently:

> . . . the participants should keep in mind that the Commission's order of March 7, 1979, explicitly charges the presiding judge with the responsibility, and delegates to him the authority, with respect to studies and interim operating measures during the period prior to final Commission action in the proceeding initiated by that order.

Public Utility District No. 2 of Grant County, Washington et al., 18 FERC ¶ 61,023 (1982). The new license contains adequate provisions to implement any changes in project operation or structures that we deem necessary for the protection and enhancement of the fisheries resources when an adequate record has been certified to the Commission. We believe that the Director appropriately issued the new license for Project No. 943.[5]

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[5] The Fisheries Service also requests that a hearing be held to develop license conditions. We have already established a hearing

Exhibit S

The Fisheries Service argues that the new license should be "withdrawn" pending the completion of the Exhibit S (fish and wildlife report). Under Article 48 of the original license, the Licensee was ordered to file a revised Exhibit S "within three years after initial operation of the second powerhouse."[6] The final unit of the second powerhouse was placed into operation in August 1979. Thus, under Article 48, the revised Exhibit S would be filed in August 1982. Article 38 of the new license orders the Licensee to file a revised Exhibit S "within three years from the date of issuance of this license" which would be May 12, 1984.

We can find no reason to "withdraw" the license pending the filing of a revised Exhibit S. The options available to the Commission in addressing the fisheries problems are not reduced by requiring a revised exhibit to be filed after the issuance of the license. We are amending Article 38 of the license, however, to reflect the original timetable for the filing of the revised Exhibit S.

Need for Environmental Impact Statement

The Fisheries Service argues that the issuance of the new license for Project No. 943 is a major federal action significantly affecting the quality of the human environment and that therefore, staff was required to prepare an environmental impact statement ("EIS"). The Licensee states that no EIS is required because there is no proposal to change the status quo at the project.

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on the fisheries issue. That hearing is the appropriate forum for the development of any further license conditions that may be appropriate for the protection and enhancement of the fisheries resource.

[6] In 1974 the Commission authorized the construction of a second powerhouse at Rock Island Dam. The Commission added Article 48 to the license at that time. Public Utility District No. 1 of Chelan County, Washington, 51 FPC 1141 (1974).

The standard for determining the need for an EIS is whether the action is a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c). The key, however, is whether the issuance of the new license for the project significantly affects the quality of the environment. The test for determining if the impacts are significant is twofold:

(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it; and,

(2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

Hanly v. *Kleindienst*, 471 F.2d 823, 830 (2nd Cir. 1972). The issuance of a new license for this project does not fit either of the criteria that establishes an impact as significant. Other than the continuing impacts on the fisheries resource, the Fisheries Service has failed to identify any environmental impacts caused by the issuance of the license. We find no impacts that should be addressed by staff in an EIS. The continuing impact of the project on the fisheries resource is being addressed in the separate proceeding. The license is adequately conditioned to provide for the protection of the environmental resources of the project area. We find that the issuance of the new license for Project No. 943 does not significantly affect the quality of the human environment and, therefore, no EIS is required.

New Development in the Law

The Fisheries Service argues that the Pacific Northwest Electric Power Planning and Conservation Act ("Pacific Act"), 16 U.S.C. § 839, *et seq.*, requires that

the fisheries resource receive equal treatment with power production in the decision-making process. The Fisheries Service asserts that the Director's order fails to make the appropriate finding that the fisheries resource is receiving equitable treatment.

The Pacific Act states that agencies that regulate hydroelectric development, such as this Commission, shall:

> exercise such responsibilities . . . in a manner that provides equitable treatment for such fish and wildlife with other purposes for which system and facilities are managed and operated. (Section 4(h)(11)(A)(i).

As we have often repeated in this order, the separate proceeding is providing a forum to ensure that the fisheries resource receives appropriate treatment.

In describing the separate proceeding the Director's order states:

> . . . (the Licensee) is conducting studies to investigate the effect of the project on the downstream migration of juvenile salmonids, the methods of improving protection and natural production of salmonids and the methods of improving and increasing semi-natural and artificial production of salmonids from the Mid-Columbia River.

The new license is conditioned so that appropriate changes in project operation and structures can be made, if needed, to ensure that the fisheries resource receives the appropriate treatment. The decision, however, cannot be made without an adequate record. The separate proceeding has developed interim protections for the resource while a record is being developed to provide for long-term protection and enhancement of the resource. We find that the fisheries resource is receiving the appropriate treatment by this Commission.

The Fisheries Service also argues that the Pacific Act requires the Commission to consult with them. The application for license in this proceeding was processed pursuant to our normal procedures. This includes specifically requesting federal, state and local agencies to comment on the application. Notice was also published in local newspapers and the *Federal Register* requesting comments. These procedures ensure that the consultation requirements of various statutes are met. We believe that these procedures are adequate for any consultation requirements of the Pacific Act.

Pursuant to the Pacific Act, a regional fisheries plan is being developed.[7] The Fisheries Service argues that an article should be included in the license requiring compliance with the regional fisheries plan. We are not including an article in the license requiring compliance with the regional fisheries plan. The plan has not yet been developed. Compliance with the plan by projects licensed by this Commission is not mandatory.[8] The separate proceeding is to determine, in part, the effect of the project on the fisheries resource. We believe that it would be imprudent to adopt such an article with two unknowns present; that is, what the regional plan is and the extent of the projects' impacts on the fisheries resource. Therefore, we are denying the request for an article requiring compliance with the as yet undeveloped regional fisheries plan. Of course, the regional plan should in the future serve as an important document in determining the long-term solutions for protection and enhancement of the fisheries resource in Mid-Columbia River. We are including Article 45 in the license to reserve to the Commission the authority to re-examine the project when the regional plan is adopted.

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[7] The plan is to be completed by November 15, 1982.

[8] *See* Section 4(h)(11)(A)(ii) of the Pacific Act.

The Yakimas argue that the Director's order fails to reflect the Commission's obligations under *U.S.* v. *Washington, Phase II*, 506 F. Supp. 187 (W.D. Wash. 1980).[9] The Licensee argues that the Indian Treaty rights are being taken care of in the separate proceeding. The Licensee notes that Yakima Indian Reservation is outside of the physical coverage of the Phase II decision.

The Director's order maintains the status quo with respect to any impacts that the project may have on the fishery habitat. If, however, the project does impact the fishery habitat in which the Yakima claim treaty rights, the separate proceeding will resolve that issue. We find no reason to amend the Director's order to discuss this issue.

Access to Data

The Fisheries Service requests that it have full and complete access to all data and information and that it be fully consulted on all fishery matters. The Licensee did not respond to these requests.

The data and information being generated in the separate proceeding is available to all of the parties. Also, the Licensee is required to consult with the Fisheries Service in the preparation of its revised Exhibit S and additionally in accordance with the applicable statutes.

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[9] *U.S.* v. *Washington*, Phase I (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)) establishing that certain tribes whose treaties reserved the right to fish at their usual and accustomed fishing places were entitled under certain circumstances to one half of the fisheries resource. Phase II found that implicit in the treaties was "the right to have the fishery habitat protected from manmade despoliation". 506 F. Supp. at 203.

The Commission orders:

A) Article 38 of the license for Project No. 943 is amended to read as follows:

Article 38. The Licensee shall, on or before August 31, 1982, file for Commission approval a revised Exhibit S including, among other things, "as constructed" fishery drawings prepared in accordance with the Commission's Rules and Regulations, the results of the pre-and post flooding studies, and any proposals for mitigative measures needed to protect and enhance the fish and wildlife resources affected by project operation.

B) The license for Project No. 943 is amended to include the following article:

Article 45. The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies or affected Indian Tribes, alterations of project structures and operations to take into account to the fullest extent practicable the regional fish and wildlife plan developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

C) All other requests on appeal of the order issuing a new major license for Project No. 943 are denied.

D) The appeal and subsequent filings made by the National Wildlife Federation are rejected.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FISH AND WILDLIFE
RESOURCES

Before Commissioners: C.M. Butler III, Chairman;
Georgiana Sheldon and
Oliver G. Richard III.

Project Nos. 943-012, 013, and 014

PUBLIC UTILITY DISTRICT NO. 1 OF)
CHELAN COUNTY, WASHINGTON)

ORDER ON REHEARING

(Issued November 23, 1982)

Applications for rehearing have been filed by the National Marine Fisheries Service ("NMFS")[1] and the Public Utility District No. 1 of Chelan County, Washington ("PUD") of our order denying NMFS's appeal of the issuance of a new license for the Rock Island Project No. 943.[2] NMFS is concerned primarily with the project's im-

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[1] NMFS filed its petition for rehearing jointly with the Oregon Department of Fish and Wildlife and the Yakima Indian Nation. However, only NMFS has filed and been granted intervention in this proceeding. In accordance with Section 313 of the Federal Power Act, rehearing only lies for those that are parties to the proceeding (*i.e.*, intervenors). Therefore, the petition for rehearing as it relates to Oregon and Yakima was not accepted for filing. For the same reasons, the petition for rehearing filed by the National Wildlife Federation also was rejected.

[2] 19 FERC ¶ 61,223 (June 4, 1982).

pact on the Columbia River fisheries. The PUD objects to certain aspects of Articles 38 and 45 of the license.

Appeal by NMFS

1. *Request For New Hearing*

NMFS again objects to the Commission's use of a "separate" proceeding to address the project's impact on the Columbia River fisheries.[3] NMFS argues that the license should not have been issued without adequate conditions to protect the fisheries, and that a record to support these conditions could be developed at a hearing. According to NMFS, the hearing should address technical issues such as flows, spills, collection and by-pass, and compensation.

NMFS's complaint that the fishery problems related to Project No. 943 should not be addressed in the context of the on-going proceeding appears to stem from NMFS's frustration and impatience with the pace of that proceeding. This proceeding was established at the request of federal and state fishery management agencies in order to develop a record to determine what changes, if any, should be made in project structures and operation in order to preserve, protect, and enhance the Columbia River fisheries. We do not think that the public interest would be well served by disbanding the existing proceeding and instituting a new one in order to accommodate one of the participants. NMFS's request for a new proceeding appears to be little more than an attempt to circumvent the Commission's current effort to compile an adequate and orderly record on these issues. If NMFS perceives deficiencies in the on-going proceeding, the bet-

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[3] The "separate" proceeding, which is currently pending before an Administrative Law Judge, consolidates for hearing and resolution the question of the effect of Project Nos. 943, 2114, 2145, and 2149 on the Columbia River fisheries. *Public Utility District No. 2 of Grant County, Washington, et al.* 6 FERC ¶ 61,210 (Mar. 7, 1979).

ter course would be for it to try to correct those deficiencies in the context of that proceeding.

2. *Need For EIS*

NMFS also argues that an environmental impact statement should have been prepared prior to issuing the new license. On this point, NMFS raises no new arguments that have not been discussed in our previous orders in this docket. We find that the environmental record already compiled is adequate to support our order issuing a new license for the existing Rock Island Project, especially in light of our decision to include open-ended conditions pertaining to fisheries that will be finalized on the basis of the record compiled in the on-going proceeding discussed above.

3. *Equitable Treatment of Fisheries Issues*

On another matter, NMFS argues that relegating the fisheries issue to a separate proceeding, while approving the power operations by issuing a new license, is not equitable treatment of the fisheries as contemplated by the Pacific Northwest Electric Power Planning and Conservation Act ("Pacific Act").[4] Section 4(h)11(A)(i) of the Pacific Act requires that the fisheries be given equitable treatment with other project purposes in the decision-making process.

We first note that the Commission, long before passage of the Pacific Act, has sought to balance power and fisheries interests when issuing licenses. Secondly, in issuing new licenses for old projects, as is the case here, we have often found it necessary to have the applicant and interested agencies conduct rather detailed fisheries studies of several years' duration. When there is only one applicant for the new license, it frequently makes sense to go ahead and issue the new license before the lengthy

[4] 16 U.S.C. § 839 *et seq.*

studies are complete, so as to put in effect sooner the new license conditions, which relate to *all* aspects of the project and in many cases strengthen the protection of other aspects of the public interest in the project. Because this procedure enhances our regulatory posture and enables us to better deal with environmental issues, we cannot concur in NMFS's complaint that the fisheries are being short-changed by our issuance of the new license.

4. *Requirement to Consult*

On the matter of consultation with fish and wildlife agencies and Indian Tribes under section 4(h)(11)(B) of the Pacific Act, NMFS asserts that the Commission must do more than provide public notice and opportunity for comment on the application. NMFS overlooks the fact that our regulations require consultation between applicants and agencies prior to filing of the application.[5] The applicants meet with the agencies and seek review and comment on the draft application. We believe that this pre-filing consultation, coupled with the agencies' post-filing opportunity to review and comment on the application, satisfies the consultation requirements of the Pacific Act.

5. *NMFS's Stricken Pleading*

Finally, NMFS objects to our striking its answers to the PUD's response to its petition for appeal. We struck NMFS's filing because it "merely expands on or responds to arguments previously presented." 19 FERC ¶ 61,233 at 61,438. NMFS, however, contends that the stricken filing addresses new issues, and is not merely a further explication of old issues. We have re-examined NMFS's filing, and are unable to identify any new issues addressed therein. Accordingly, we reaffirm our decision to strike this repetitious filing from the record.

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[5] *See* 18 C.F.R. § 4.41 (1982).

PUD's Petition for Rehearing

The PUD argues that the date specified in Article 38 for submission of a revised Exhibit S (fish and wildlife report) is impractical, because the fishery studies have not been completed. The PUD states that agreements on the studies have now been reached with the fish and wildlife agencies.[6] The PUD therefore requests that Article 38 be amended to extend the filing date of the revised Exhibit S until May 1984. Under the circumstances, we are persuaded that the PUD's new schedule is reasonable and should be adopted. Article 38 will be amended to reflect the new schedule.

The PUD also argues that any re-examination of the project pursuant to Article 45 should be tempered by a "reasonableness" standard, and that any alterations to the project not be ordered without notice and opportunity for a hearing.[7] Our actions are always governed by a rule of reasonableness, and where license articles are left open-ended for a future determination, notice and opportunity for a hearing are inherent.[8] The PUD's proposed amendment of Article 45 is rejected.

The Commission orders:

All pending motions and petitions for rehearing are denied, except for the PUD's request that Article 38 of the license be amended as follows:

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[6] The Washington Department of Game apparently does not agree with the PUD's new schedule, and takes the position that the revised Exhibit S should be filed as soon as possible. And as previously discussed, NMFS maintains that the license application should not have been accepted nor the license issued until a revised Exhibit S has been filed.

[7] Article 45, which was added to the license by our previous order on appeal, reserves to the Commission authority to re-examine the project license when the regional fish and wildlife plan is adopted for the Pacific Act.

[8] *See Central Maine Power Company*, 40 FPC 1132 (1968), *reh. den.*, 40 FPC 1512 (1968); *Louisville Gas and Electric Company*, 18 FERC ¶ 61,215 (Mar. 4, 1982).

Article 38. The Licensee shall on or before May 31, 1984, file for Commission approval a revised Exhibit S including, among other things, "as constructed" fishery drawings prepared in accordance with the Commission's Rules and Regulations, the results of the pre- and post-flooding studies, and any proposals for mitigative measures needed to protect and enhance the fish and wildlife resources affected by project operations.

By the Commission.

[SEAL]

/s/ Lois D. Cashell
LOIS D. CASHELL,
Acting Secretary.

C. Order Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-7561
82-7562
83-7038

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Petitioners,

and

NATIONAL WILDLIFE FEDERATION,
Petitioner-Intervenor,

and

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,
Petitioner,

and

WASHINGTON STATE DEPARTMENT OF FISHERIES AND WASHINGTON STATE DEPARTMENT OF GAME,
Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Intervenor.

ORDER

Before: ANDERSON and FLETCHER, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The opinion filed June 7, 1984 is amended as follows: The last full paragraph on page 2502 of the slip opinion and the first phrase of the last paragraph are eliminated and replaced with:

> "A primary consideration in relicensing of projects now owned by a state or municipality is whether FERC should recommend to Congress recapture (or takeover) by the United States. 16 U.S.C. § 807. Although takeover is not among FERC's options in this case, since Chelan is a municipality as defined in 16 U.S.C. § 796(7), *see* 16 U.S.C. § 828(b) (takeover not permitted of projects owned by a state or municipality). FERC still retains several options that it must consider in an EIS. FERC can relicense to Chelan, relicense to another licensee, or issue a non-power license. *See* 16 U.S.C. § 808(a) & (b).
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> "The [C]ommission is authorized . . ."

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* The Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

II. STATUTES

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16 U.S.C. § 799 (1982)

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41.

16 U.S.C. § 808 (1982)

§ 808. New licenses and renewals; compensation of old licensee; licenses for nonpower use; recordkeeping

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover

any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of sections 828 to 828c of this title, every licensee for nonpower use shall keep such accounts and file such annual

and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

42 U.S.C. § 4332(2)(C) (1982)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has juris-

diction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

III. OTHER MATERIALS

A. Order Amending License

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer and Don S. Smith.

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PROJECT NO. 943

ORDER AMENDING LICENSE (MAJOR)

(Issued March 29, 1974)

Application was filed on February 15, 1973, and revised on March 23, 1973, by Public Utility District No. 1 of Chelan County, Washington (Applicant) for amendment of the license for Rock Island Project No. 943. Supplemental information was filed on February 23, April 2, April 9, April 12, and May 31, 1973. The approval of the proposed amendment would allow the Applicant to construct a second project power plant and modify the existing dam to permit the reservoir forebay to be raised 6.1 feet vertically.

Public notice of the filing of the application was given on April 19, 1973, with an extended date of June 15, 1973, as the last day for filing of protests or petitions to intervene.

The project is located on the Columbia River near the cities and towns of Chelan, Ephrata, Rock Island, Waterville, and Wenatchee, in Chelan and Douglas Counties, Washington. The existing project would be modified to include a semi-outdoor type powerhouse containing eight

horizontal shaft, bulb-turbine generator units (51.3 mw each), a new fish passage facility replacing the existing right bank fish ladder, extension of the existing middle and left bank fish ladders, addition of two miles of new 115-kv transmission lines, raising Rock Island reservoir 6.1 feet from 608.0 to 614.1 feet (U.S.G.S. datum), and other alterations to existing facilities to accommodate the raised reservoir forebay. The new 410,400-kilowatt plant would provide additions in regional peaking capacity of about 383 mw, and an increase in the average annual generation of about 1,296 million kilowatt-hours. The 18-unit project is estimated to have an average annual energy generation of 2,780 million kwh.

The Applicant, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington, intends to finance the proposed addition to the project by the issuance of electric revenue bonds. The interest and principal of these bonds, similar to those it has issued for other projects, will be paid from revenues derived from the sale of power produced by the project. Applicant foresees that the total bond issuance to be in the order of $140 to $150 million depending upon the financing interest rate. Included in Exhibit G of the application is the status and rating of bonds, as of December 31, 1971, previously issued by the Applicant.

By order of the Washington State Department of Ecology on October 12, 1973, there was issued to the Applicant in Docket No. DE-73-179 a modification of water quality criteria. On March 5, 1974, the Commission received the Applicant's water quality certificate issued by Washington State Department of Ecology.

Interested Federal, State, and local agencies have reported favorably on the application. The applicant has had the opportunity to respond to all the comments, and did so to some of them on September 28, 1973. While no agency objected to amending the license, there were re-

quests that certain conditions be included in any license amendment issued. The revised articles and additional special articles included in the ordering paragraphs would update the present license and provide further for the protection and development of fish, wildlife, water quality, recreation, scenic and other environmental values at the project.

The Atomic Energy Commission in a letter dated June 25, 1973, believes that the project will have no effect on its Hanford Plant operations. They were satisfied with the treatment of nuclear generation alternative.

The Department of Agriculture, Forest Service, in a letter dated July 24, 1973, states that the proposal will have no primary or secondary effects on the Wenatchee National Forest.

The Department of Army, Corps of Engineers, by letter of June 28, 1973, states that the proposed modifications will have minimal effects on flood damage reductions downstream of the project and navigation in the vicinity of the project. The plans for the structures affecting navigation are satisfactory. They suggest that the backwater could have an effect on the outlet structures of the authorized flood control project for Canyons 1 and 2 in Wenatchee, Washington. Any revisions of the backwater curves of the Exhibit H in the application should be reported to the District Engineer of the Corps. Article 64 added to the license by this order provides for the Corps' recommendation.

By letter of June 1, 1973, the Department of Commerce, National Marine Fisheries Service, recommended three special conditions to be contained in any license amendment issued for the project. These included: (a) Applicant shall finance preflooding and postflooding studies to determine any project effects on fishery resources and any costs for conservation and development of fish resources which are deemed to be necessary by the

studies; (b) Applicant shall provide for construction, maintenance, and operation of facilities for the conservation and development of fish and wildlife resources and modify any project structures as ordered by the Commission; and (c) Applicant shall permit the United States to construct or otherwise provide for fish and wildlife facilities at the project. Commerce also commented on the submitted Exhibit S stating that the study program as indicated will probably be greater in scope, cost, and recognition of needed facilities. Special Articles 48 and 49 and amended license Article 21 provide for Commerce's request.

In a letter dated August 6, 1973, the Department of the Interior did not object to the project. However, Interior desired that there be some clarification of most of the exhibits submitted. Their main concern was in the delay allowed for the filing of an Exhibit R; however, we believe it reasonable to allow one year for filing of the Exhibit R. Interior's comments on the Exhibit W generally dealt with the need for more information and a thorough investigation of matters, such as the potential direct relation between project implementation and landslide activity. The comments were considered in Staff's Draft Environmental Impact Statement. The amended license articles and additional articles are consistent with Interior's comments on Staff's Draft Statement.

Washington State Department of Game questioned the adequacy of certain statements in their letter of June 22, 1973. They point out that some of the conclusions in the application cannot be proven until the contemplated studies are completed. Game's main contentions deal with the effect of the bulb turbine on migrants, nitrogen saturation in the tailrace, loss of game habitat, loss of nesting sites, and the effect on wildlife.

By letter of June 6, 1973, the Washington State Department of Fisheries insists that provisions be made for

screening the turbines and by-passing the juveniles since the evidence is inconclusive as to what the effect of the bulb turbines will be on the juveniles. They were also interested in the nitrogen super-saturation, the fish runs, and spawning areas. The matters raised in Fisheries' and Game's letters were considered in detail in Staff's Final Environmental Impact Statement and provided for in revised Article 21 and in Article 48.

The Douglas County Citizen Advisory Committee for the Shoreline Management Act in a letter dated May 30, 1973, expressed concern over the orchards that will be affected by the enlarged project. The Committee requests that more be done dealing with the golf course; they suggest that it be relocated and propose alternate sites. They stress its value to the community, and not just as a recreational area. Other points of concern that the Committee raised were wildlife nesting areas, changes in groundwater elevations, and the mosquito situation in the slough areas. Article 50 calls for pre- and post-flooding studies on the effects of raising groundwater levels. Article 51 provides for vector control. Article 55 requires the filing for Commission approval of an Exhibit R (Recreational Use Plan) which would include alternatives to, if not replacement of, the golf course.

The Board of County Commissioners of Douglas County, Washington, in their letter of April 9, 1973, foresee no extensive damaging environmental impact. They stated that the applicant would be required to pay for improving or replacing the needed road which would be inundated. Article 54 requires the Applicant to consult and cooperate with them as to the relocation of roads.

The Department of Transportation, United States Coast Guard, by letter of June 5, 1973, expressed concern that the increase in the generating capacity may have some effect on the problem of inductive coupling with railroad signal and communications lines. In their

letter of August 17, 1973, they would like to have more information on the effects of river flow manipulation on future navigation and other problems a mariner might face particularly when there are abrupt current changes. Amended Article 11 concerns the problem of inductive interference. Article 63 provides for consultation with the railroad on needed alterations.

Washington State Department of Social and Health Services on May 24, 1973, directed its comments towards the mosquito problem and the relocation of people. The Department of Housing and Urban Development on May 21, 1973, was also concerned with the relocation of persons. They would like to see more information on the replacement of the approximately 50 acres of agricultural land and the golf course. Special Article 55 deals with the golf course, and Special Article 58 provides for a relocation advisory service. Special Article 51 provides for vector control.

The Washington State Highway Commission on June 13, 1973, lists three areas of concern which were: (a) the Columbia River Bridge at Olds presently under construction; (b) the proposed alignment of SR-28 along the east bank of the Columbia River at 19th Street of which substantial portions of the gravel bar will be inundated; and (c) sections of existing SR-28 between Sta. 470 and 480 and Sta. 571 and 533 to be affected by the raised backwater encroachment. The Department does not object to the proposed action, they only desire that proper identification of impact on the existing and proposed highways is made and proper protective measures are included in the proposal. These matters were considered fully in Staff's Final Environmental Impact Statement. Special Article 54 provides for consultation as to the relocation of roads.

The Environmental Protection Agency (EPA) reporting on June 11, 1973, offered no objection to the license amendment. EPA said that the amendment would allow

more efficient use of the waters of the Columbia River and it should also reduce supersaturation of dissolved gases in the flow. Article 48 provides for the monitoring of dissolved nitrogen levels and temperature as recommended by EPA.

Other agencies commenting on the proposed amendment and offering no objection included the Pacific Northwest River Basins Commission by letter of August 8, 1973, Department of Health, Education, and Welfare by letter of June 13, 1973, Washington State Parks and Recreation Commission by letter of July 26, 1973, State of Washington Office of Program Planning and Fiscal Management by letter of July 6, 1973, and State of Washington Department of Natural Resources by letter of April 12, 1973.

On June 15, 1973, a petition to intervene was filed by the Washington Department of Fisheries and Department of Game (Departments). The Departments felt it necessary to petition because of the possible effects of the proposed action upon food fish, game fish, and wildlife resources of the State. They suggest that research studies be done. They were at that time negotiating with the pertinent agencies for funding for the studies. On July 27, 1973, Applicant filed an answer to the Departments' petition. While the Applicant stated that they did not oppose the petition, they think that the Departments' rights and interests will be protected and preserved by research, investigations, and studies to be funded by the Applicant. The petition to intervene was granted by the Commission in an order issued September 18, 1973. We believe that the Departments' rights and interests are being amply protected by the studies being conducted in cooperation with the Applicant. License articles are being included to insure protection.

On June 14, 1973, Public Utility District No. 2 of Grant County, Washington (Grant) filed with the Commission a petition to intervene in the proceedings. The

basis for Grant's petition is the contract between Applicant and Grant in which Grant pays to Applicant money for lost energy at Rock Island due to the encroachment by its Wanapum Reservoir of Project No. 2114. They are fearful that by enlarging Rock Island, Applicant will ask for increased payments to help finance the construction. On July 27, 1973, Applicant answered Grant's petition contending that Grant will be liable for any power or energy loss, damage, and expense due to encroachment after the expansion of Rock Island is completed. Applicant feels that the problem can be solved through briefing rather than an evidentiary hearing. They are arguing that the issue is legal not factual. Applicant also states that if any damage arises from the construction and operation of the new powerhouse they, the Licensee, would be held liable under Section 10(c) of the Federal Power Act. Intervention was granted by the Commission on September 18, 1973.

On August 13, 1973, Grant filed a reply to Applicant's answer to the petition to intervene. In the reply, Grant contends that the issues involved are a mixture of fact and law, and, thus, would require a factual record before any meaningful briefs could be submitted. We believe that neither this proceeding nor this forum is the proper place to solve a possible question of money damages [1] involving a contract made in the State of Washington. Although intervenor's license for Project No. 2114 refers to this contract and requires compliance with its terms, the contract provisions are not made a part of the license.[2] Because the problem is one of contractual right to payments between Applicant and Grant, not involving the cost of construction, feasibility of the proposal, nor en-

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[1] See *Idaho Power Company*, 29 FPC 572.

[2] See *P.U.D. No. 2 of Grant County*, 14 FPC 1067. Although requested to do so (14 FPC at 1070), the Commission declined to include the applicant's obligation under the agreement as conditions of any license issued (14 FPC at 1074).

vironmental effects; the controversy should not delay the construction. Therefore, the issues raised in the petition dealing with the contract and payments thereunder do not require an evidentiary hearing before the Commission nor a determination by the Commission at this time. It is significant to note that the question of power loss can be best established after the powerhouse is placed in operation. Further, no damages under the contract can be established prior to that time.

On December 14, 1973, the Washington State Department of Highways (Highways) petitioned the Commission to intervene in the proceedings to insure greater protection for their interests. The proposed addition will effect Highways in these ways: (a) possibility of altering the structure or modifying the permit for clearance of a bridge of SR-2 currently under construction; (b) possible modification of the frontage road grade on the proposed alignment of SR-28 along the east bank of the Columbia River; and (c) possibility of raising the highway grade of existing SR-28 between Sta. 470 and 480 and Sta. 517 and 533 where the backwater will encroach onto the right-of-way. The petition of Highways was granted by order of the Commission issued on February 27, 1974. It would appear that Highway's rights are being sufficiently protected. Applicant appears to realize its obligations as illustrated on page 3 of the Exhibit F in that they intend to work with Highways to fully protect the highway system. There is to be included in the license Article 54 to require the Licensee to consult and cooperate with Highways in the relocation of roads.

The Commission received several protest letters, including one from Mayor M. A. Guerin of Rock Island, concerning the inundation of the nine-hole golf course in Rock Island, Washington. The Mayor was also concerned about the slough areas. They were disturbed because the golf course is being destroyed and there were no provisions for its replacement. However, the Applicant stated

on pages 5-4 of its environmental report (Exhibit W) that they will consult with governmental bodies, interested persons, and organizations as to the need for and economic feasibility of replacing the golf course. They said that a provision for other compensating recreational facilities, if not the golf course, is anticipated as being included in the Recreational Use Plan (Exhibit R) to be filed. Applicant is allowed one year to submit the Exhibit R following approval of the application for amendment of the license.

The Applicant has submitted an environmental report. Based upon this report and an independent investigation of its own, the Commission Staff compiled a Draft Environmental Impact Statement and circulated it on October 31, 1973, among the interested Federal, State, and local agencies as well as to individuals and organizations for comment. After consideration and review of these comments, a Final Environmental Impact Statement was prepared by our Staff which was distributed on January 28, 1974. On the basis of the information contained in the Staff's final statement and other material on file with the Commission, we are of the opinion that the beneficial effects from construction and operation of the additional powerhouse at Rock Island will offset any adverse effects on the environment of the area.

We have carefully considered the environmental impact of the proposed project. There will be an impact on land resources of the project area resulting from the installation of a second powerhouse and raising of the reservoir level. An additional 335 acres of land will be flooded as a result of this action. These lands support a wide range of activities which included natural, commercial, residential and recreational activities. Six businesses and industries will be inundated resulting in their relocation, abandonment, or additional construction for protection. Flooding will also inundate sixteen residences of which fourteen are inhabited. These persons will have to be

relocated. Some irrigation systems and domestic wells may be affected by higher groundwater levels. Approximately 50 acres of orchards will be inundated or adversely affected through root saturation. This represents about $225,000 in estimated land value. The recreation to be affected includes a nine-hole municipal golf course near the town of Rock Island, three boat ramps on the reservoir, and sport fishing and wildlife.

Transportation facilities to be affected are a bridge under construction, some portions of a highway, and part of a highway, and part of the Burlington-Northern Railroad tracks. All of these can be modified to allow the continuation of their use.

Various studies, both pre-flooding and post-flooding, are being financed by the Applicant to be undertaken by Federal and State agencies to determine the effect of the reservoir raising and additional powerhouse on the fish, wildlife, and natural habitat such as the taking of nesting areas. Applicant proposes to have periodic site inspections by professional archeologists to provide for protection of any archeological resources affected by the construction. No historical sites will be affected by the proposed action.

During the construction there will be some strain on the socioeconomic community. Even though the Applicant intends to recruit the majority of the construction force from the vicinity of the project, there will be an increase in the use of local resources and public facilities by the influx of additional construction workers. This impact, however, is expected to be minimal and probably only for 14 months. What impact there is, could be at least partially offset by a growth in the local tax base to which these people would contribute.

For about 14 months in the immediate vicinity of the construction the air quality will be adversely affected by emissions from heavy equipment and dust due to excava-

tion. Noise levels would also be higher than normal. The water quality during construction could be affected by increased turbidity, sedimentation, and run-off from exposed slopes. Articles 59 and 60 require measures be taken to prevent stream siltation and to avoid or minimize any disturbance caused by the construction of the additional project works.

Once the addition to the project is completed, operation will continue generally as it does now, except that there will be a decrease in spillage with more water passing through the new turbines. This change should improve the nitrogen super-saturation content of the water due to the decrease in the spillage. The maximum reservoir drawdown for the proposal would be four feet to elevation 610.1 feet. Freeboard would be provided between the normal forebay level and the top of the spillway gates to avoid inadvertent overflows. The objective of maximizing resource utilization will be greater realized with the proposed addition.

The unavoidable adverse affects include the removal of 16 residences, and higher groundwater table might affect septic tank system, water quality, and health standards. Of the approximately 335 acres of land to be inundated, there are three areas of biotic interest that would be adversely affected: (a) Canada goose nesting grounds; (b) the slough area; and (c) the flood plain. Also taken or affected would be approximately 50 acres of orchards, transportation facilities, a nine-hole golf course, and three boat ramps. Unavoidable adverse effects on the anadromous fish could come about because of increase in depth of the water, change in water flow velocities, loss of some portion of existing spawning areas, and increased mortalities to downstream migrants by passing through turbines instead of over the spillway. There would be a loss of environmental quality during construction such as increased solid waste, sewage, noise levels, dust and

vehicle emissions, soil run-off, and consumption of local resources.

The short term environmental uses can be offset by the long term benefits of energy production and implementation of effective mitigative measures. For instance, the existing shoreline vegetative habitat would be lost, but it should gradually re-establish itself along shores of the enlarged reservoir. Relocating the families affected would cause them inconvience during that time. The temporary increase in population will put a strain on the environment and local resources.

There would be an irreversible and irretrievable commitment of resources such as construction materials and supplies. As long as the structure is in place, there would be an irretrievable commitment of shoreline vegetation used as wildlife habitat. Commitments such as land resources could be retrievable if the structure should be removed. Also lost would be the present land use of those acres that will be inundated. There could be the loss of downstream migrating salmonids because they would have to pass through the proposed powerhouse where mortality may be higher than if they were spilled.

Consideration has been given to alternatives to the proposed addition to the project. Those studied were other hydroelectric sites, combustion turbine, combined cycle, baseload oil-fired and baseload nuclear steam-electric generating plants, purchased power, and no action.

The so-called "exotic" alternatives, such as fusion power, solar power, and MHD, are not considered realistic alternatives because at the present none of adequate size are commercially developed. There has not been any known drilling for potential geothermal power generating resources in Washington, and the only known geothermal resource area is around Mount St. Helens near the Washington-Oregon border.

In the discussion of the combustion turbine alternative, the benefits are that the units are relatively small in size permitting installation near existing plants, have negligible cooling water requirements, and require short lead time for construction. The negative factors are low efficiency, high operating and maintenance costs, consumption of fuels in short supply, and emission of combustion by-products into the atmosphere. The annual cost of producing power by the combustion turbine does not compare at all favorably to the cost of power from the second power plant.

In considering the combined cycle plant, the beneficial aspects are capability of operating at high and intermediate load factors and its capability to firm dump and secondary hydro energy. The adverse factors of the combined cycle are many. They include siting problems, finding adequate cooling water, supply of fuel, use of a exhaustible natural resource, air pollution from stack emissions, consumptive use of water or in the alternative discharge of heated water, cost of providing condenser cooling and of constructing new transmission lines, and the adverse impact to scenic value. The annual cost of producing power would be substantially more than it would be at the Rock Island addition.

The advantages of a baseload oil-fired steam-electric plant would be capability of operating at high plant factor and possible use to firm dump and secondary hydro energy. The adverse effects are similar to those seen in the combined cycle plant. In addition large tanks to store the oil would have to be constructed increasing the cost and the adverse impact on the scenic values. The estimated total annual cost of producing power from this alternative would be substantially more than the proposal.

The nuclear steam plant benefits include a large amount of high load factor power, no release of combustion products into the atmosphere, and no consumption of fossil fuels. The negative aspects are siting problems,

need for large cooling water supply, use of an exhaustible natural resource, long lead time necessary for construction, problems and cost of disposing the spent nuclear fuel, and cost of providing condenser cooling, of constructing new transmission lines, and of fuel. The proposed development's annual cost of power would be substantially less than the nuclear steam plant.

The Pacific Northwest is already extensively developed for hydroelectric power, therefore the remaining potential hydroelectric projects are either under study, in some stage of development, or economically and/or environmentally undesirable. A review has shown that there are no potential hydroelectric projects in the area available to the Applicant which could be economically developed.

While conservation practices are desirable to reduce the demand for electric power, it appears that such practices are not likely to eliminate the need for power from the proposed development or some alternative thereto. Thus, in the alternative of no action, the Applicant and the Pacific Northwest Power Pool would need to provide equivalent power from other sources to meet their requirements. The waters flowing past the project, a renewable resource, would continue to be unused.

Currently, the Applicant is unable to purchase power from the Bonneville Power Administration equal to the output from the Rock Island project. In the future, if Applicant were able to purchase at present rates BPA power equivalent to project output, it would cost less than power from Rock Island. However, there are indications that the rates will increase this year and in the following years which could more than nullify any previous economic advantage of purchasing additional power.

Various Federal and State agencies in cooperation with the Applicant are conducting and proposing to conduct further studies to determine the effect of the addition on many aspects of the environment. When the studies are

completed, it is anticipated that the results will permit decision as to what additional mitigating measures may have to be undertaken in accordance with the terms of the license.

The additional United States lands, if any, to be occupied by the raised reservoir elevation cannot be determined at this time. The proposed Exhibit K shows the general location of the revised project boundary, but is lacking in essential survey and ownership data necessary to make a determination. The computation of the increase, if any, of annual charge for the use of United States lands will be made at a later date when the revised Exhibits F, J, and K are filed.

The Applicant provided information that the power would be taken entirely by Puget Sound Power and Light Company (Puget Sound) for the first 20 years, half each by Puget Sound and Applicant for the next 20 years, and entirely by Applicant for the remaining 10 years. From an economic analysis the proposed addition appears to be economically justified.

The proposed addition would affect no historical sites listed in the National Registry of Historic Places. However, the existing Rock Island dam, the first hydroelectric development on the Columbia River, is presently under consideration by the Washington State Parks and Recreation Commission for nomination to the National Registry. Archeological excavations between Rock Island and Rocky Reach (Project No. 2145) dams indicate use of the project area along the river by prehistoric Indian tribes. License Article 52 provides that any survey or needed salvage excavations should be done in cooperation with Washington State University.

To be also included in the license are the generator leads, the two 7.0/115 KV step-up transformers, the two 115 KV lines to the McKenzie-Valhalla substation, and appurtenant facilities of the proposed new plant.

The Commission further finds:

(1) Public notice of the filing of the application for amendment has been given. Intervention has been granted to Public Utility District No. 2 of Grant County, Washington, Washington Department of Fisheries, Washington Department of Game and Washington State Highway Commission.

(2) The installed capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 830,000 horsepower, and the amount of annual charge based on such capacity to be paid under the license for the project for the cost of administration of Part I of the Act is reasonable as hereinafter fixed and specified.

(3) The exhibits designated and described in paragraph (B) below conform to the Commission's Rules and Regulations and should be approved as part of the license for the project to the extent indicated, and superseded exhibits should be eliminated from the license.

(4) Amendment of the license for the project does not affect any existing government dam. However, the Department of the Army, Corps of Engineers, while not objecting to the amendment, reports that backwater resulting from raising the reservoir elevation could affect the outlet structures of the authorized but unconstructed flood control project for Canyons 1 and 2 in Wenatchee, Washington. Accordingly, any revision to the backwater curves shown on Sheet 2, dated January 24, 1973, of Exhibit H to the application should be reported promptly to the District Engineer of the Seattle District of the Corps of Engineers.

(5) It is appropriate and in the public interest to amend the license for Project No. 943 as authorized herein.

The Commission orders:

(A) Licensee, Public Utility District No. 1 of Chelan County, Washington, is hereby authorized to construct, operate, and maintain a second project powerhouse and appurtenant facilities, install 410.4 MW of additional capacity in eight 51.3 MW generating units, and modify the existing dam to provide for raising the reservoir 6.1 feet at the Rock Island Project No. 943, located on the Columbia River in Chelan and Douglas Counties, Washington, effective the first day of the month in which the Commission acts on the application.

(B) Subparagraph B of Article 2 of the license for Project No. 943 is amended in part to read:

B. Project works consisting of:

(1) a concrete gravity dam about 3,580 feet long with a gated spillway section 1,184 feet long containing 31 crest gates; (2) a reservoir extending about 20 miles upstream having a normal maximum forebay elevation 614.1 feet U.S.G.S. and an active storage capacity of 11,000 acre-feet at a maximum reservoir drawdown of 4 feet for power operations; (3) a concrete powerhouse about 870 feet long integral with the dam containing one 15,000 KW generating unit, three 20,700 KW generating units, and six 22,500 KW generating units (10 units totaling 212.1 MW); (4) a step-up substation on the powerhouse roof; (5) a high-tension switching station on Rock Island; (6) four single-circuit 115 KV transmission lines extending from the switching station for a distance of about two miles to the McKenzie switchyard; (7) a 115 KV transmission line, including a 1.5 mile tap line to the Dryden substation, extending about 85 miles from the McKenzie switchyard to the Town of Skykomish; (8) a second project powerhouse at the right bank about 465 feet long and 200 feet wide containing eight 51.3 MW horizontal shaft, bulb-turbine type generator units (8 units totaling 410.4 MW); (9) step-up transformers at

the second powerhouse connected to two single-circuit 115 KV transmission lines extending about two miles to the McKenzie-Valhalla substation; (10) three fishways and related fish facilities; and (11) appurtenant facilities:— the location, nature and character of which are more specifically shown and described by the exhibits hereinbefore cited in subparagraph A, and by certain other exhibits which accompanied the application for license, or the applications for amendments thereof, and which are designated and described as follows:

Exhibit	FPC No. 943	Showing
J	-120	General Map of Project Area.
K-1	-121	Project Boundary Map.
K-2	-122	Project Boundary Map.
K-3	-123	Project Boundary Map.
K-4	-124	Project Boundary Map.
K-5	-103	Project Boundary Map.
K-6	-104	Project Boundary Map.

which are approved only insofar as they show the general location of project facilities.

Exhibit	FPC No. 943	Showing	Superseding Exh. FPC No. 943
L-1	-105	General Plan of Development	-78
L-2	-106	Second Powerhouse Plan	
L-3	-107	Second Powerhouse Cross Section	
L-4	-125	Second Powerhouse Main One Line Diagram	
L-5	-109	Existing Spillway Dam	-86, -93, -94
L-6	-126	Existing Powerhouse Sections	-63, -65, -80

Exhibit M: Consisting of six typewritten pages entitled "General Description of Equipment", filed with the Commission on February 15, 1973.

Exhibit S: Consisting of ten typewritten pages entitled "Fish and Wildlife", an six drawings (FPC Nos. 943-111 through -116) filed with the Commission on February 15, 1973.

Exhibit V: Consisting of four typewritten pages entitled, "Protection and Enhancement of Natural, Historic, and Scenic Values," filed with the Commission on February 15, 1973.

(C) The exhibits designated and described in Paragraph (B) above are hereby approved to the extent indicated and made a part of this license and the superseded exhibits noted above are eliminated from the license for Project No. 943.

(D) Article 6 of the license for Project No. 943 is amended by adding the following paragraph:

> The Licensee, Public Utility District No. 1 of Chelan County, Washington, shall commence construction by March 1, 1975, of the additional project works included in the license by this order and shall thereafter in good faith and with due diligence prosecute such construction and shall complete construction of such additional project works within 5 years from the effective date of this order.

(E) Articles 22 and 23 are deleted from the license, and Articles 5, 8, 11, 14, 21 and 42 of the license for Project No. 943 are amended to read as follows:

Article 5. The construction, operation, and maintenance of the project and any work incident to additions or alterations shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project. Construction of the project works or any feature thereof shall not be initiated until the program of inspection for the project works or any such

feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow him and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health, or property.

Article 8. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the license, or in the maintenance of the project, such material shall be removed and deposited in such a manner that it will reasonably preserve the project environmental values and so it will not interfere with traffic, both land and water. Dredging and filling in a navigable water of the United States will be done to the satisfaction of the District Engineer, Seattle District, Department of the Army.

Article 11. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any struc-

tures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

Article 14. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purpose of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the License, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

Article 21. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain and operate, or shall arrange for the construction, maintenance and operation of such facilities and comply with such reasonable modifications of the project structures and operations as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior, the Secretary of Commerce, or the Washington Departments of Fisheries and of Game, after notice and opportunity for hearing.

Article 42. The normal operating pool elevation shall be an elevation of 606.0 feet with variations up to a

maximum of elevation 608.0 for flows of 85,000 cfs or less. For inflows between 85,000 and 615,000 cfs, Licensee shall regulate the pond level so as not to exceed a maximum elevation of 608.0 feet. For inflows greater than 615,000 cfs, all spillway gates shall be open.

Upon completion of construction to raise the reservoir from elevation 608.0 to 614.1 feet U.S.G.S. datum, Licensee shall regulate the reservoir level so as not to exceed elevation 614.1 feet at the project dam for inflows up to 820,000 cfs. For inflows greater than 820,000 cfs, all spillway gates shall be open.

(F) Subparagraph A of Article 26 of the license for Project No. 943 is amended to read:

A. For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge as determined by the Commission in accordance with the provisions of its regulations, in effect from time to time. Effective the first day of the month in which this order is issued, the authorized installed capacity for such purpose is 830,000 horsepower;

(G) The license is further amended by adding thereto the following special articles:

Article 48. The Licensee, in consultation and cooperation with the Fish and Wildlife Service, U.S. Department of the Interior; the National Marine Fisheries Service, U.S. Department of Commerce; the U.S. Environmental Protection Agency; and the Washington State Departments of Ecology, Fisheries and Game, shall conduct pre- and post-flooding studies to determine the effects of project redevelopment on Columbia and Wenatchee River fish and wildlife resources. As part of these studies, the Licensee shall monitor temperature and dissolved nitrogen levels above and below the Rock Island Project. The Licensee shall file, within three years after initial operation of the second powerhouse, for commission approval a revised Exhibit S including "as-constructed" fishway

drawings, prepared in accordance with the Commission's Rules and Regulations, and including among other things, the results of the pre- and post-flooding studies and any proposals for mitigative measures needed to protect or develop the water quality and fish and wildlife resources affected by project operation.

Article 49. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of Licensee's lands and interest in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 50. The Licensee following consultation and cooperation with the Environmental Protection Agency and the Washington Department of Social and Health Services, shall conduct pre- and post-flooding studies on the effects of raising reservoir and ground water levels on septic tanks, industrial and domestic settling ponds, and well water systems, and shall implement any protective or mitigative measures needed for public health purposes, including relocation of sewage, waste or well facilities.

Article 51. The Licensee shall consult and cooperate with the Washington Department of Social and Health Services, and the Douglas County Planning Commission to

determine what, if any, vector control measures are needed at the project.

Article 52. The Licensee, in cooperation with Washington State University, shall do or pay the cost of doing (1) an archeological survey of the project area on which excavation or flooding will occur, and (2) any salvage work needed to preserve the archeological values affected by project construction and flooding. Copies of such surveys and salvage reports shall be filed for the information of the Commission.

Article 53. The Licensee shall cooperate with the Washington State Parks and Recreation Commission in helping to identify any historical sites at the project for nomination to the National Register of Historic Places.

Article 54. The Licensee shall consult and cooperate with the Washington State Highway Department and the Douglas County Board of Commissioners in the relocation of roads as required by the Rock Island redevelopment.

Article 55. The Licensee, within one year from the date of issuance of this order, shall file for Commission approval an Exhibit R (Recreational Use Plan). Exhibit R shall be prepared in conformance with Sections 4.41 and 4.42 of the Commission's Regulations and shall include outdoor recreation facilities alternative to, if not in replacement of, the nine-hole golf course to be inundated by the project.

Article 56. The Licensee shall construct, maintain and operate or shall arrange for the construction, maintenance and operation of such recreational facilities including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities and utilities, and shall comply with such reasonable modifications of the project structures and operations as may be prescribed hereafter by the Commission during the term of this license upon its own mo-

tion or upon the recommendation of the Secretary of the Interior or other interested Federal and State agencies, after notice and opportunity for hearing.

Article 57. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting; Provided, that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property. Licensee, in the interests of promoting optimum recreational use and protecting the scenic values of project lands and waters, may to a reasonable extent grant permits to individuals or groups of individuals for landscape plantings on project lands, or for the construction of access roads, wharves, landings, and other similar facilities, the occupancy of which may, under appropriate circumstances, be subject to the payment of rent in a reasonable amount; *Provided*, that Licensee, in granting such permits, shall require that permittees provide for multiple occupancy and use of such facilities, where feasible, and shall ensure that such facilities are constructed and maintained in such a manner so as to be consistent with shoreline aesthetic values; *Provided further*, that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities. These facilities are in addition to the facilities that the Licensee may construct and maintain as required by the license.

Article 58. The Licensee shall establish a relocation advisory service and give reasonable financial assistance to assist in the relocation of persons now located in the affected project area and to minimize any hardship to

such persons thereof arising from such relocation. The provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 shall be used as a guide to implement this article.

Article 59. The Licensee shall be responsible for and shall take reasonable measures to prevent soil erosion on lands adjacent to the stream(s) and to prevent stream siltation or other forms of water or air pollution resulting from construction, operation or maintenance of the project. The Commission upon request, or upon its own motion may order the Licensee to take such measures as the Commission may find to be necessary for these purposes after notice and opportunity for hearing.

Article 60. The Licensee shall in the design, construction, and maintenance of the additional project works including transmission lines, follow the Commission's "Guidelines for the Protection of Natural, Historic, Scenic and Recreational Values in the Design and Location of Rights-of-Way and Transmission Facilities" of Commission Order No. 414, 44 FPC 1491, and other recognized engineering and landscaping practices as may be needed to protect and preserve the environmental values of the project; and shall avoid or minimize any disturbance caused by construction and maintenance of the additional project works to the natural, scenic, historical and recreational values of the area, blending project works with the natural view, and revegetating, stabilizing, and landscaping any construction areas located outside the area of the project reservoir.

Article 61. The Licensee shall clear project areas to be flooded, dispose of all temporary structures, unused timber, brush, refuse, and inflammable materials resulting from the redevelopment of the project. Such work shall be conducted to the satisfaction of an authorized representative of the Commission.

Article 62. The Licensee shall, to the satisfaction of the authorized representative of the Commission, install

and operate such signs, lights, sirens or other devices below the powerhouses to warn the public of fluctuations in flow from the project, and shall install such signs, lights and other safety devices in the project reservoir, such as log booms above the spillway and powerhouse intakes, as may be reasonably needed to protect the public in its recreational use of project lands and waters.

Article 63. The Licensee shall consult and cooperate with representatives of Burlington-Northern Railroad in making any needed alterations to railroads affected by the Rock Island redevelopment.

Article 64. The Licensee shall consult and cooperate with the District Engineer, Seattle District, U.S. Army Corps of Engineers, on any needed alterations of project operations during flood flows in the Columbia River. The Licensee shall report any revision of the backwater curves shown on Exhibit H, Sheet 2, dated January 24, 1973, to the above-mentioned office.

Article 65. The Licensee shall retain a Board of two or more qualified independent engineering consultants, who have not participated substantially in the design of the proposed project works, to review the safety and adequacy of all features of the project as proposed for modification. Among other things, the Board shall assess the geology of the project site and surroundings; the design and specifications for the new powerhouse; the design and installation of post tensioned anchors in the existing powerhouse, spillway, and non-overflow sections; the construction inspection program; construction procedures and progress; and instrumentation of the completed project. The Board will review, evaluate, and report on each major element of project design prior to initiation of construction of that project element and will submit a final report upon completion of the project. The Licensee shall submit copies of all Board reports to the Commission.

Article 66. The Licensee shall install appropriate instrumentation or other devices to monitor movement, up-

lift, and continuing performance of the post tensioned project structures. A plan of instrumentation and a schedule of recording instrument readings shall be furnished to the Commission prior to initial operation of the proposed powerhouse. The Licensee shall furnish annually to the Commission, or as may be requested by the Commission or its authorized representative, a report and analysis of the instrument readings.

Article 67. The Licensee within five years from the date of issuance of this order shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the second project powerhouse. The Commission expressly reserves the right on approval of revised Exhibits R and K to be filed pursuant to the amended license to require acquisition of title in fee for lands needed for purposes of shoreline control and recreation in accordance with Order No. 313 (34 FPC 1546).

Article 68. The Licensee within one year from date of issuance of this order shall file with the Commission a revised Exhibit F and, for Commission approval, revised Exhibits J and K fully conforming to the requirements of § 4.41 of the Commission's Regulations to show the redeveloped project.

(H) This amendment in the manner set out above shall not operate to alter or amend the license in any other respects, and shall not in any way constitute a waiver of any other part, provision or condition of the license.

(I) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license amendment. In acknowledgment of the acceptance of this license amendment it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

B. Orders in Mid-Columbia Proceeding

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Hearing: Temporary and
Long-Term Flow Releases;
Fisheries

Before Commissioners: Don S. Smith, Acting Chairman;
Georgiana Sheldon and
Matthew Holden, Jr.

Project No. 2114

PUBLIC UTILITY DISTRICT NO 2
OF GRANT COUNTY, WASHINGTON

Projects Nos. 943 and 2145

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY, WASHINGTON

Project No. 2149

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON

Docket No. E-9569

STATE OF WASHINGTON DEPARTMENT OF FISHERIES

v.

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, WASHINGTON

ORDER CONSOLIDATING PROCEEDINGS, ESTABLISHING HEARING AND REQUIRING PREHEARING CONFERENCE

(Issued March 7, 1979)

Background

The recent petitions. The State of Washington Department of Fisheries and Department of Game, the Oregon Department of Fish and Wildlife, the U.S. National Marine Fisheries Service, and the Confederated Tribes and Bands of the Yakima Indian Nation (petitioners) have recently filed petitions asking the Commission to modify the operation of Priest Rapids Project No. 2114, Wells Project No. 2149, Rock Island Project No. 943 and Rocky Reach Project No. 2145, or, in the alternative, to institute a proceeding to consider their requests. The four projects are located on the Columbia River in the State of Washington.

The petitioners claim that commercial, Indian, and sport fisheries have suffered severe losses over the last twenty years due to the construction and operation of the four projects listed above. They are seeking certain minimum flows and spills at each project dam for the protection of the chinook, sockeye, and coho salmon and steelhead trout resources. The petitioners submitted provisional recommendations for instantaneous and daily average minimum flows, ranging from 10,000 cfs to 110,000 cfs, depending on the time of the year and the location of the project. They also request that during the period of spring juvenile downstream migration (April 26 through June 15), the equivalent of twenty percent of the average daily discharge at each project be spilled, rather than used to generate power.

The petitioners' requests are made pursuant to Article 39 of the license for Project No. 2114,[1] Article 41 of the

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[1] Public Utility District No. 2 of Grant County, Washington, Order Issuing License (Major), 14 F.P.C. 1067, 1073 (1955), *as amended*, 15 F.P.C. 1005, 1006 (1956).

license for Project No. 2149,[2] Article 21 of the license for Project No. 943,[3] and Article No. 31 of the license for Project No. 2145.[4] These articles generally require the licensees to comply with reasonable modifications to the operation of the project in the interest of fish and wildlife resources.

The petitioners assert that the licensees for these four mid-Columbia projects have been unable to obtain consent from their bulk power purchasers to accommodate the desired spring spilling. In addition, they state that the flows requested are also being negotiated with the Bonneville Power Administration, Bureau of Reclamation, and the Corps of Engineers for the upstream federal dams those agencies operate.

In separate answers, the licensees for the four mid-Columbia projects opposed the requested modifications, but stated that they are willing to discuss these matters with the petitioners. Generally, the licensees argue that the available evidence does not support a modification in the current operations of the projects. They state that alternative, less costly means are available to facilitate downstream migration. The licensees also assert that the Commission lacks the authority to require modifications in the current minimum flows, and that any such requirement without their consent would contravene Section 6 of the Federal Power Act, 16 U.S.C. § 799. In addition, the licensees contend that they cannot implement minimum flows until upstream federal projects—the Corps of Engineers' Chief Joseph and the Bureau of

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[2] Public Utility District No. 1 of Douglas County, Washington, Order Issuing License (Major), 28 F.P.C. 128 (1962), *as amended*, 28 F.P.C. 492 (1962).

[3] Public Utility District No. 1 of Chelan County, Washington, Order Amending License, 51 F.P.C. 1141, 1152 (1974).

[4] Public Utility District No. 1 of Chelan County, Washington, Opinion No. 304, 18 F.P.C. 25, 36 (1957).

Reclamation's Grand Coulee Dams—modify their flow releases.

The Priest Rapids complaint. Before these recent petitions, the State of Washington Department of Fisheries (Department) had filed a complaint on September 22, 1976, respecting the operation of the Priest Rapids Project No. 2114 (Docket No. E-9569).[5] The Department alleged that the area downstream from the Priest Rapids Dam serves as an important spawning and rearing area for fall chinook salmon. The Department claims that the 36,000 cfs minimum flow established in the project license[6] causes many valuable spawning areas to dry up, resulting in the stranding and subsequent death of eggs and juvenile fish. The Department requested that the minimum flow requirement in the license be increased to 70,000 cfs during the period of October 15 to April 30 of each year. This period would allow for spawning, incubation of eggs, and rearing of juvenile fish. After notice of the complaint was issued, several petitions to intervene were filed and the Licensee, Public Utility District No. 2 of Grant County, filed its answer opposing the relief sought.

Between two conferences our staff held on March 3, 1977, and October 17, 1978,[7] the Department filed a motion on October 5, 1978, requesting that the minimum flows from the Priest Rapids Project be increased from 36,000 cfs to 50,000 cfs. This motion was supported by

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[5] The Priest Rapids project consists of two dams, Priest Rapids and Wanapum.

[6] Article 45, 14 F.P.C. at 1074.

[7] In addition to the two conferences our staff has held concerning the complaint, a number of other conferences and meetings have been held among the parties under the auspices of the Columbia Committee on Fishery Operations. These meetings led to agreements under which certain steps, including spilling, were taken to insure the safe passage of juvenile fish during past annual spring migration runs.

the Oregon Fish and Wildlife Commission, the Yakima Indian Nation, Idaho Fish and Game Commission, and the National Marine Fisheries Service. This motion was filed for the same reason the complaint was filed—to protect chinook salmon spawning and incubation areas—but subsequent to a joint study conducted by the Department and Public Utility District No. 2 of Grant County.[8]

PUD No. 2 of Grant County in its answer stated that the Department had failed to set forth facts in support of its request for a hearing. Grant County further stated that it believed that the measures taken during the 1977 spawning season were successful and should be continued for another year, with certain modifications. Under that 1977 scheme of regulation, minimum flows of 36,000 cfs were periodically released from the Priest Rapids Dam.

Consolidation

Because the matters and issues raised by the complaint are closely related to or subsumed within those raised by the more recent petitions, we will consolidate the complaint and petitions for consideration in a single proceeding. All of the parties earlier permitted to intervene with respect to Docket No. E-9569 will also be deemed intervenors with respect to the petitions in the consolidated proceeding.[9]

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[8] That study culminated in Technical Report No. 38 entitled "The Effect of Daily Flow Fluctuations on Spawning Fall Chinook in the Columbia River." According to the Department's October 5, 1978, motion, the licensee has refused to modify the operation of the project in the manner recommended in the study.

[9] In addition to the three licensees, the Department, and the petitioners, these intervenors in Docket No. E-9569 are parties to the consolidated proceeding:

The Washington Water Power Company; Puget Sound Power & Light Company; Portland General Electric Company; Pacific Power & Light Company; the Cities of Eugene, McMinnville, Milton-Freewater, and Forest Grove, Oregon; State of Oregon

Hearing Issues

We find that it is appropriate and in the public interest that a hearing be held to investigate whether the operation of the projects listed above should be modified in the interest of protecting the fishery resources of the Columbia River. The following issues shall be considered during the hearing:

(1) the extent, if any, to which the current minimum flow at the Priest Rapids Project No. 2114 should be increased for the purpose of protecting the chinook salmon spawning and incubation areas downstream from the dam;

(2) the ways, if any, in which the operations of Projects Nos. 943, 2114, 2145, and 2149 should be modified in the interest of protecting chinook, sockeye, and coho salmon, and steelhead trout which must pass these mid-Columbia projects (including determinations of any appropriate instantaneous and daily average minimum flows and spilling percentages); and

(3) all other associated issues raised by the Washington Department of Fisheries' complaint in Docket No. E-9567, the Department's motion filed October 5, 1978, and the petitioners' motions filed on December 4 and 15, 1978.

As we noted earlier, the licensees argue that the Commission lacks the authority to require changes in minimum flows without their consent. For example, P.U.D. No. 2 of Grant County argues that Article 39 of its Project No. 2114 license does not grant the Commission the authority to amend Article 45, which specifies a mini-

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Fish and Wildlife Commission; City of Seattle, Washington; City of Tacoma, Washington; Cowlitz County Public Utility District; State of Idaho Fish and Game Commission; and the Confederated Tribes of the Umatilla Indian Reservation.

mum flow of 36,000 cfs.[10] The licensees' arguments, however, are without merit.

Article 39 of the license for Project No. 2114 provides:

> *The licensee shall* construct, operate and maintain or shall arrange for the construction, operation and maintenance of such fish ladders, fish traps, fish hatcheries, or other fish facilities or fish protective devices for the purpose of conserving the fishery resources, and *comply with such reasonable modifications in project* structures and *operations* in the interest of fish life in connection with the project as may be prescribed hereafter by the Commission upon recommendations of the Secretary of the Interior, the Washington State Departments of Fisheries and Game and the licensee. [15 F.P.C. 1005, 1006 (1956). Emphasis added.]

Flow releases are unquestionably an element of "project operations", which we may reasonably modify in the interest of fish life.[11]

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[10] Article 45 provides:

> The licensee shall so regulate the flow from Project No. 2114 that it will not result in flows of less than 36,000 cubic feet per second of water at the Hanford Works of the Atomic Energy Commission except when conditions are beyond the licensee's control.

Grant County P.U.D. also argues that an agreement it entered with the Department on September 16, 1963, bars the Department from seeking any relief. That agreement, however, has never been approved by the Commission and in no way binds us. In any event, we may investigate the matters at issue here on our own motion, under Article 18 of the Project No. 2114 license. See p. 7 *infra*.

[11] Article 45 of the Project No. 2114 license is irrelevant to the issue of flow releases for protecting fish life. That article sets a *minimum* flow for the purpose of ensuring the safe operation of the downstream Hanford Nuclear Plant. It does not establish a ceiling on minimum flows for other purposes, nor was it designed to provide sufficient protection for fish life.

In any event, the licensees also overlook the standard article contained in each of the four licenses which provides:

> . . . the operations of the licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations . . . as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for *other beneficial public uses, including recreational purposes*, and *the licensee shall release water* from the project reservoir *at such rate* in cubic feet per second, *or such volume* in acre-feet per specified period of time, . . . *as the Commission may prescribe for the . . . purposes* [other than navigation] *hereinbefore mentioned.* [Emphasis added.][12]

The words "other beneficial public uses, including recreational purposes" are taken directly from Section 10(a) of the Federal Power Act. In *Udall* v. *FPC*, 387 U.S. 428 (1967), the Supreme Court ruled beyond cavil that this language includes the purpose of protecting anadromous fishery resources (specifically including salmon and steelhead trout).

In light of these open-ended license articles, we find that we have ample authority to require modifications to the projects' operations to provide the relief the complainant and petitioners seek, or other relief that may prove necessary or desirable. The licensees' contentions that such modifications would alter their licenses without

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[12] Project No. 2114, Art. 18 [14 F.P.C. 1067, 1072 (1955)]; Project No. 2145, Art. 18 [18 F.P.C. at 35]; Project No. 2149, Art. 18 [28 F.P.C. 128, 132 (1962)]; see generally 16 F.P.C. 1121, 1125 (1956). Project No. 943, Art. 14 [51 F.P.C. at 1151-52].

their consent, in violation of Section 6 of the Federal Power Act, are not well taken.

The issuance of a license does not relieve the Commission from ensuring throughout the term of the license that fishery resources are protected and enhanced. During the term of a license, changes in circumstances or available information may well demand reappraisal of the ways in which the project as originally conceived may be kept best adapted to a comprehensive plan of development. This is precisely why we include open-ended conditions in the project licenses. A modification under such an open-ended license article is not an alteration within the meaning of Section 6 of the Act requiring a licensee's agreement. Both the courts and Congress have recognized the Commission's authority to impose open-ended license conditions, which reserve our right to *impose* changes in project works or operations despite Section 6.[18] By accepting a license with open-ended conditions, a licensee agrees to make modifications the Commission might order under those conditions. If the licensee could later avoid the imposition of modifications ordered under an open-ended license condition simply by refusing to agree to them, the Commission's recognized reservation of rights would be vitiated.

Need for Expedited Hearing—Phase I

In providing for a hearing, we recognize that there have been extensive and continuing efforts to resolve the anadromous fish problems related to the construction and operation of the four mid-Columbia projects. The final solution to these problems may require a substantial amount of time for discovery, further studies, discussions among the parties, and hearings.

The immediate problem, however, concerns the impending Spring 1979 downstream migration of smolts during

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[18] *See* State of California v. FPC, 345 F.2d 917, 924-25 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965); H.R. Rep. No. 1643, 90th Cong., 2 Sess. 2 (1968); 114 Cong. Rec. 21440-41 (1968).

their journey seaward. According to the pleadings, the migration would begin around the middle of April and continue to the middle of June. With so little time available before migration begins, we find that due and timely execution of our responsibilities in this matter imperatively and unavoidably requires departures from our usual practice and procedure. Because the parties have been unable to resolve their differences over what measures should be required for this coming spring, we are directing the presiding administrative law judge to convene a prehearing conference in Portland, Oregon, on March 20, 1979, for the exlusive purpose of considering the issue of what interim measures, if any, should be imposed to protect the Spring 1979 downstream fish migration. If it appears to the presiding judge that the parties have been unable to resolve their differences over the proper operating regime during the Spring 1979 downstream fish migration by the end of the prehearing conference, he shall convene the hearing immediately and continue it until he has compiled a sufficient record to reach a decision on what measures should be required for this spring.[14] All parties should come to the hearing prepared to present oral evidence and to cross-examine any oral testimony by sworn witnesses.

We are delegating authority to establish the Spring 1979 interim operating measures to the presiding judge, who must render a decision on this phase of the hearing by April 13, 1979. The licensees must follow the presiding judge's decision on the interim measures. Those measures will go into effect immediately and will be stayed only by Commission action. Any party wishing to appeal or support the presiding judge's decision on interim measures must do so by filing its briefs, com-

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[14] The presiding judge and the parties should consider the extent to which those interim measures might best be adapted to any additional studies that may be desirable to develop information sufficient to reach a long-term solution to the mid-Columbia anadromous fish problems.

ments, or statements of position within fifteen days of issuance of the decision.

Hearing—Phase II

Further scheduling of hearings in the remainder of this proceeding will be the responsibility of the presiding judge. Moreover, as noted above, additional studies may be required before a long-term solution can be reached, and may even be needed before effective hearings can commence to consider what fish measures should be required for the remainder of the license terms. Moreover, interim operating measures may be necessary beyond the Spring 1979 downstream fish migration, to facilitate studies or to govern during the period prior to final Commission action in this proceeding. These matters, as well as the development of a complete record, will be left to the judgment of the presiding administrative law judge as part of the exercise of his delegated authority under Section 1.27 of our regulations.

The Commission orders:

(A) The complaint proceeding designated Docket No. E-9569, and the petitions discussed above and filed by petitioners in Projects Nos. 943, 2114, 2145, and 2149, are consolidated.

(B) Pursuant to the Federal Power Act, particularly Sections 4(g), 10(a), 10(g), 306, 307, 308, and 309, the licenses for Projects Nos. 943, 2114, 2145, and 2149, and the Commission's Rules of Practice and Procedure, a hearing shall be held in this proceeding respecting the issues discussed above, in accordance with the provisions of this order.

(C) The Commission's Rules of Practice and Procedure shall apply in this proceeding except to the extent they are modified and supplemented below.

(D) A prehearing conference shall be held commencing at 9:30 a.m. local time on March 20, 1979, in Judge Soloman's court room of the U.S. Courthouse, 620 S.W.

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Main, Portland, Oregon, to initiate the first phase of the hearing in this proceeding. The first phase will consider the interim operating measures necessary or desirable for Projects Nos. 943, 2114, 2145, and 2149 during the Spring 1979 downstream fish migration on the Columbia River.

(E) Under Section 309 of the Federal Power Act, 16 U.S.C. 825h, the Commission delegates to the designated presiding administrative law judge authority to order the licensees for Projects Nos. 943, 2114, 2145, and 2149, to modify the operations of those projects during the Spring 1979 downstream fish migration. The presiding judge's order on interim operating measures shall be issued no later than April 13, 1979. The effect of the presiding judge's order shall be stayed only by Commission action. Any party wishing to appeal or support the presiding judge's order shall file its brief, comments, or statement of position no later than 15 days from the issuance of that order.

(F) Any order of the presiding administrative law judge on modifications to the operations of Projects Nos. 943, 2114, 2145, and 2149, beyond the Spring 1979 downstream fish migration shall be effective immediately and be stayed only by Commission action. Any appeal from such an order must conform to Section 1.7(d) of the Commission's regulations.

(G) The licensees for Projects Nos. 943, 2114, 2145, and 2149, the complainant and intervenors in Docket No. E-9569, and the petitioners identified above shall all be permitted to participate in this consolidated proceeding.

(H) The Secretary shall cause prompt publication in the Federal Register of notice of the prehearing conference ordered in paragraph (D) above.

By the Commission

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr.,
and George R. Hall.

Project No. 2114

PUBLIC UTILITY DISTRICT NO 2
OF GRANT COUNTY, WASHINGTON

Project Nos. 943 and 2145

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY, WASHINGTON

Project No. 2149

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON

Docket No. E-9569

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES

vs.

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, WASHINGTON

ORDER APPROVING INTERIM OFFER OF SETTLEMENT AS MODIFIED

(Issued March 20, 1980)

On March 7, 1979, the Commission consolidated several matters into the captioned proceeding which is to determine whether the operation of Project Nos. 943, 2114, 2145 and 2149 should be modified in the interest of protecting the fishery resources of the Columbia River, including, among other matters, determinations of appropriate flows at the Priest Rapids, Wanapum, Rock Island, Rocky Reach and Wells dams in the middle reaches of that river within the State of Washington. The Commission said that questions pertaining to studies and interim operating measures that may be required for a long-term resolution of the proceeding would be left to the judgment of an administrative law judge as part of the exercise of his delegated authority under § 1.27 of the Commission's Rules of Practice and Procedure.

On December 31, 1979, the PUDs[1], licensees of the foregoing projects, together with the United States Fish and Wildlife Service, the National Marine Fisheries Service, the Oregon Department of Fish and Wildlife and the Idaho Department of Fish and Game submitted an interim Offer of Settlement[2] to the presiding administrative law judge for comment and approval. The "Agreement" therein recites, among other matters,

> A five-year study program shall be conducted by the Public Utility Districts to investigate the effect

[1] Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Chelan County, Washington; and Public Utility District No. 1 of Douglas County, Washington.

[2] The Offer of Settlement was negotiated by the parties and is obviously an interim measure designed to gather data, rather than a final resolution of appropriate flows.

of the projects and their operation on the downstream migration of juvenile salmonids, the methods of improving protection of natural production of salmonids, and the methods of improving and increasing semi-natural and artificial production of salmonids from the Mid-Columbia River.

Comments submitted by the Washington State Department of Fisheries and Department of Game (WDF/WDG), the State of Washington Department of Ecology, the Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribes), the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Tribes) and the Commission staff counsel, generally recommend approval of the Offer of Settlement although, in some instances, the recommendations are conditioned upon certain clarifications. WDF/WDG, however, recommends its certification with "slight modifications" to the Commission for approval.

Responses to the comments were submitted by the parties sponsoring the Offer of Settlement, as well as by the staff counsel, and generally clarified that offer in the aspects requested. But the sponsoring parties rejected the modification proposed by WDF/WDG.[3] Thereafter, on March 4, 1980, the presiding judge modified the Offer of Settlement in accordance with the clarifications of the sponsoring parties; rejected the modification of WDF/WDG; ordered the Offer of Settlement effective, as so modified, as of that date[4]; and certified it, also as so modified, to the Commission for approval.[5] In doing so,

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[3] The Yakima Tribes, on the other hand, added their support to the modification.

[4] Pursuant to Ordering Paragraph (F) of the Commission's order of March 7, 1979.

[5] Pursuant to § 1.18(e)(4)(ii) of the Commission's Rules of Practice and Procedure. The judge noted, in this connection that counsel for Public Utility District No. 2 of Grant County, Washington, requested "expedited consideration" to permit bids to be

the judge said, "Final resolution [of the issues in this proceeding] will be possible only after the necessary data has been collected during the interim second stage."

The Offer of Settlement provides, among other matters, for the maintenance of specified flows at the five dams, and for spills at each of the dams that will begin on specified dates and will continue "for 30 days or until approximately 80% of the migrating juveniles have passed the dams, whichever is sooner." WDF/WDG, supported by the Yakima Tribes, request that the quoted language be modified so that the spills will continue "for 30 days or until the migrating juveniles have passed, whichever is later." Citing the treaties between the United States and the Umatilla and Yakima Tribes, as well as Section 10(a) of the Federal Power Act and certain decisions of the Supreme Court [6], they contend that "additional progressive destruction of the fish runs should not be consciously approved."

The PUDs respond that while the cited authorities can be read to require reasonable protection of the fishery resources of the Columbia River, those authorities do not require that the development and utilization of other water resources of that river be subordinated to the protection of *all* of the migrating juvenile salmonids. They say that the question of whether more fish are injured going through turbines, or falling over spillways, is one of the principal issues in this proceeding. And they point out that the 80% limitation in question is only one of several components of the five-year interim program, and

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solicited early in March for the purpose of altering the Priest Rapids spawning channel in time for the 1980 Spring migration.

[6] *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), *Puyallup Tribe, Inc.* v. *Department of Game of Washington*, 433 U.S. 165 (1977) and *State of Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, —— U.S. ——, 61 L.Ed.2d 823 (1979).

that WDF/WDG "have suggested no specific [compensating] changes in the other components." The other parties sponsoring the Offer of Settlement explain, in this connection, that salmon tend to migrate in peaks approximating a bell-shaped curve, and that the spills are to be targeted at the peaks of the migrations to assure maximum protection of the fish with the available amounts of water:

> Spill would not commence until the initial 10 percent of the migrating fish had passed the PUD dams. As migrating builds and peaks, spill would gradually be increased to up to 20 percent per dam, and would be adjusted using available water until most of the fish had passed the dams. Under this regime, the amount of spill would parallel the distribution of the migrating populations; spill would be directed at the central 80 percent of the fish populations, but would not be provided for the initial 10 percent or final 10 percent of those populations.

The presiding judge said that it is not now possible to decide the relative merit of protecting only 80%, or the requested 100%, of the migrating juvenile salmonids, because there is no conclusive evidence as to whether the turbines or spillways are more deleterious to the fish, adding, that WDF/WDG does not attempt to justify its request for 100% protection as being factually superior. The presiding judge said one of the objectives of the proposed five-year study is to collect reliable information on which to base a decision as to whether turbines or spillways are more deleterious. And he concluded that WDF/WDG's proposal is not supportable as a matter of law for the reasons advocated by the parties sponsoring the Offer of Settlement.

We have considered the Offer of Settlement and the comments and responses of the parties, and we approve that offer as modified, and for the reasons set forth, in

the presiding judge's Certification of Settlement Agreement and Interim Order of Operating Procedures dated March 4, 1980. As the staff counsel indicated in her response to the comments, the proposed studies are designed to help answer the question of whether the spills lessen the mortality rate of the downstream migrants, and Section 9 of the Offer of Settlement provides for convening a settlement conference for the purpose of seeking modifications of the minimum flow or spill requirements. Therefore, depending upon the early results of the studies, the parties can request a settlement conference to increase or decrease the spills that are provided in the Offer of Settlement.

The Commission orders:

The interim Offer of Settlement submitted in this consolidated proceeding on December 31, 1979, is approved as modified and placed into effect by the presiding administrative law judge on March 4, 1980.

By the Commission.

[SEAL]

LOIS D. CASHELL,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project No. 2114

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, WASHINGTON

Projects Nos. 943 and 2145

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY, WASHINGTON

Project No. 2149

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON

and

Docket No. E-9569

STATE OF WASHINGTON DEPARTMENT OF FISHERIES

vs.

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, WASHINGTON

SUBMISSION OF OFFER OF SETTLEMENT

Pursuant to the provisions of Section 1.18 of the Commission's Rules of Practice and Procedure, the below listed parties submit the attached Offer of Settlement. This proceeding is currently before Presiding Judge Al-

len C. Lande, and it is requested that the Secretary transmit this offer to him.

EXPLANATION

These proceedings were initiated by a petition filed by various parties to amend the FERC licenses for the operation of Priest Rapids Project No. 2114, Wells Project No. 2149, Rock Island Project No. 943, and Rocky Reach Project No. 2145. These dams are located on the Columbia River in the State of Washington. By order of March 7, 1979, the Commission assigned the case to an Administrative Law Judge and directed that a hearing be held.

The proceeding was split into two phases for convenience of administration. Phase One was to deal with the then immediate problems of the project operations which should be maintained in the spring of 1979 to facilitate the migration of juvenile salmonids. As a result of a conference held in Portland, Oregon, a settlement for a term of one year was reached for that phase of the proceeding, which was accepted and implemented by order of the Administrative Law Judge on March 28, 1979.

Phase Two was to deal with the more long term solution of the flows to be maintained both for the downstream migration of juvenile salmonids and for the spawning of fall chinook salmon below Priest Rapids Dam. At the recommendation of the parties, Phase Two of the proceeding was itself split into two phases. The first phase was to deal with the flow requirements for fall chinook spawning, and has commonly been referred to as the "Vernita Bar" phase of this proceeding. On October 15, 1979, the Commission approved an uncontested offer of settlement which, in pertinent part, established a four year term of study to acquire the data needed for final resolution of the issues in the Vernita Bar phase.

In a settlement conference during the week of October 22, 1979, and at various times thereafter, the parties have engaged in negotiations for the purpose of reaching a settlement on the second phase of Phase Two, regarding those aspects of project operations affecting the downstream migration of juvenile salmonids. This has been commonly referred to as the "spring migration" phase, and covers the period from approximately April 15 through June 15. As a result of these negotiations, several of the parties have reached the attached Settlement Agreement, styled "Offer of Settlement."

It is to be emphasized that the concurrence of Grant, Douglas, and Chelan Public Utility Districts to be Settlement Agreement is conditioned upon its acceptance by the Commission in its entirety. Should the Commission be required to disapprove or alter any provisions of the Settlement Agreement as tendered, the Public Utility Districts would be required to withdraw their support for the Settlement Agreement and request a hearing on all of the issues pending before the Commission.

The attached Settlement Agreement covers a five year term, during which studies will be conducted by the Public Utility Districts to acquire the information necessary for a permanent resolution of the issues in the spring migration phase. During the term of the studies, minimum flows will be maintained as set forth in paragraph 2; and spill will be provided from the projects as provided for in paragraph 3. To better support the fishery resource during the term of the study and years immediately following, the Public Utility Districts have agreed to provide additional hatchery production of salmonids, as set forth in paragraph 4.

The Settlement Agreement has been circulated to the principal parties in interest to this proceeding. It is our understanding that the terms of the Settlement Agreement are acceptable to a substantial number of the parties, and that they are satisfied it provides a reasonable

resolution to the issues raised by the petitioners. Under the circumstances, we believe that submission of the attached Settlement Agreement is appropriate and that it should be approved by the Administrative Law Judge and the Commission as proposed.

REFERENCES

No testimony or exhibits have been filed in this proceeding. The record consists of the petitions of the various parties and the responses of Grant, Chelan and Douglas Public Utility Districts.

CONCLUSION

We respectfully request that you transmit this Offer of Settlement to the Presiding Administrative Law Judge in accordance with the provisions of Section 1.18. A draft of the proposed Commission order also is attached.

Respectfully submitted,

Public Utility District No. 2
of Grant County,

Public Utility District No. 1
of Chelan County, and

Public Utility District No. 1
of Douglas County

By /s/ Donald B. Myers
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For the
National Marine Fisheries
Service,

Oregon Department of Fish
& Wildlife,

Idaho Department of Fish
& Game,

United States Fish &
Wildlife Service

/s/ F. Lorraine Bodi
F. LORRAINE BODI
Staff Attorney,
NOAA General Counsel
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Seattle, WA 98109

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C., this 31st day of December, 1979.

/s/ William J, Madden, Jr.
WILLIAM J. MADDEN, JR.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project No. 2114

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, WASHINGTON,

Project Nos. 943 and 2145

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY, WASHINGTON,

Project No. 2149

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON,

and

Docket No. E-9569

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

vs.

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, WASHINGTON

OFFER OF SETTLEMENT

UNDERSTANDINGS

1. On March 7, 1979, the Commission issued an order which provided for an investigation and a hearing regarding various petitions filed in these dockets seeking

certain minimum flow releases and spills from Projects Nos. 2114, 943, 2145, and 2149.

2. During the week of October 22, 1979, the parties engaged in negotiations for the purpose of reaching a settlement with regard to the various issues raised in these petitions regarding the flow requirements, spill and project operations for the downstream migration of juvenile salmonids. This has been commonly referred to as the "spring migration" phase, and covers the period from approximately April 15 through June 15. As a result of these negotiations, the parties have reached the Agreement set forth below.

3. The Agreement reached and the approval of this Agreement by either the Commission or the Presiding Administrative Law Judge shall not constitute an approval of or a precedent regarding any principle or issue in this or any other proceeding.

AGREEMENT

1. A five-year study program shall be conducted by the Public Utility Districts to investigate the effect of the projects and their operation on the downstream migration of juvenile salmonids, the methods of improving protection of natural production of salmonids, and the methods of improving and increasing semi-natural and artificial production of salmonids from the Mid-Columbia River. The studies to be performed in 1980 and possible studies for subsequent years are set out in Appendix A. The obligation to conduct the tests is subject to the availability of suitable and adequate numbers of test fish to be provided by the fisheries agencies.

The studies to be conducted in years following 1980, the priority of studies in yielding data material to resolution of the issues before the Commission in this proceeding and their experimental design will be determined by a majority of the Studies Committee composed of

three biologists representing the Public Utility Districts and three biologists representing all other parties. If there is no agreement on either the studies to be conducted or their design, then a decision on these questions will be made by a biologist who shall be acceptable to a majority of the Studies Committee. This person shall be chosen according to the issue before the Committee. The Studies Committee's recommendations, including recommendations to perform studies requiring expenditures in excess of the annual budgets referred to below, shall be submitted in writing to the PUDs at least annually, and not later than November 15. The Studies Committee or its designee(s) may review bids for the performance of studies and make recommendations to the PUDs on award of those contracts.

The cost of studies will be shared by the PUDs in such proporation or amounts as they shall agree among themselves, and the costs of study design, implementation and analysis shall not exceed $500,000 annually (1979 dollars), unless authorized by the Public Utility Districts. The cost limitation of $500,000 does not include operation and maintenance costs or capital expenditures for production facilities. The Studies Committee may recommend studies pertaining to reasonable structural changes as may be necessary for the installation and testing of prototype bypass systems, but may not recommend such installation for at least two years. The PUDs will consider recommendations by the Studies Committee for studies requiring expenditures in excess of $500,000 per year, and will authorize those studies that are likely to yield data material to resolution of the issues before the Commission in this proceeding and if prudent budgetary constraints permit. All parties to the proceeding, including staff, will be given a reasonable opportunity each year to review and comment upon specific study plans prior to their implementation.

The PUDs' agreement to study and test prototype bypass systems does not constitute agreement that such

by-pass systems are an appropriate long-term solution for protection of the fishery resource on the Mid-Columbia River.

2. As long as operation of the upstream federal projects and reservoirs does not prevent it, the daily average minimum flows to be maintained at each dam during the term of the studies shall be those determined in accordance with the following schedule.

	Apr. 1 Apr. 15	Apr. 16 Apr. 25	Apr. 26 Apr. 30	May 1 May 31	June 1 June 15
Wells	50,000	60,000	100,000	115,000	110,000
Rock Reach	50,000	60,000	100,000	115,000	110,000
Rock Island	60,000	60,000	110,000	130,000	110,000
Wanapum	60,000	60,000	110,000	130,000	110,000
Priest Rapids	60,000	60,000	110,000	130,000	110,000

3. Spill.

A. *Period.* The period for spill provided herein at each of the dams will begin on the following dates, and will continue for 30 days or until approximately 80% of the migrating juveniles have passed the dams, whichever is sooner. When 80% of the migrating juveniles has passed the dam will be determined by a majority of the Designated Representatives or, in the absence of a majority within a reasonable time, by the Studies Coordinator:

Project	Date
Wells	April 15
Rocky Reach	April 25
Rock Island	April 25
Wanapum	May 1
Priest Rapids	May 1

The date of commencement of the spill at each dam is subject to modification upon agreement by a Designated Representative of the Washington Departments of

Fisheries and Game, of the National Marine Fisheries Service, and of the Public Utility District responsible for operation of the dam.

B. *Amount.* The amount of water to be made available for spill shall not exceed on an annual basis the amounts determined for each dam by reference to Appendix B, lines 1 and 2.

C. *Rock Island.* When the main units of the first powerhouse are not in operation, the amount of water available for spill at Rock Island dam shall be reduced proportionately to the amount of reduction in dam-related mortality (as discussed below) from the Rock Island bulb turbines as compared with Kaplan turbines in use at projects in the Columbia River basin. The basis for comparison shall be the bulb turbine mortality test conducted at Rock Island during 1979 and any previously published turbine mortality data for projects in the Columbia River basin. The comparative review of test data will be accomplished by an Ad Hoc committee composed of two representatives of the fishery agencies (Charles Junge, Wesley Ebel), two representatives of the Public Utility Districts (Dan McKenzie, Donald Chapman), and one independent representative (Douglas Chapman). The Ad Hoc Committee shall review the reliability of the results of the tests, and shall use such results as are found to be reliable by a majority of the Committee. As determined by a majority of the Ad Hoc Committee, the amount of water to be made available for spill in connection with operation of the second powerhouse shall be calculated by multiplying the ratio of all mortalities at Rock Island that are affected by the spill to all mortalities at other dams in the Columbia River basin that are affected by spill by the amount of water otherwise determined to be available in accordance with Paragraph 3B. If the majority of the Ad Hoc Committee determines that a mortality such as forebay or tailrace mortality, is affected by spill but was not measured in the Rock

Island Test or the tests conducted at other dams in the Columbia River Basin, then a majority of the Ad Hoc Committee shall rely on its best estimate of that mortality in calculating the foregoing ratio. Use of the mortality data from other dams does not imply its reliability or acceptance for any other purpose.

During the period when one or more of the main units of the first powerhouse is in operation, spill shall be accomplished from Gate 1 (at a daily average rate of 2000 cfs during the period of spill and an instantaneous minimum flow of 1000 cfs) in accordance with Paragraph 3.D. The amount of water to be made available for spill in connection with operation of the first powerhouse shall be in addition to the amount of water made available for spill in connection with operation of the second powerhouse, provided that the total amount of spill shall not exceed that determined in accordance with Paragraph 3.B. This assumes that the first powerhouse will be used for peak load generation. In the event that its use is shifted from peak to base load generation, then a majority of the Ad Hoc Committee may make appropriate adjustments to the amount of spill to be made from Rock Island dam, up to the amounts otherwise provided for in Appendix B. If an emergency condition exists, the decision shall be made by the Designated Representatives or, in the absence of a majority within a reasonable period of time, by the Studies Coordinator.

D. *Use of Spill.* Water shall be spilled up to the amounts determined in accordance with Paragraph 3.B. and 3.C. above, as it is required to effectively move fish safely past the dams. The amount, timing of commencement and duration of spill required to move fish when they are present will be determined on a continuing basis by a majority of the Designated Representatives. If a majority of the Designated Representatives cannot be contacted within a reasonable amount of time, the decisions to begin and terminate spill, and the decision on

the amount of spill to be accomplished will be made by the Studies Coordinater, as described below at Paragraph 5, or by his designee, at each dam. Unless a greater amount of spill is authorized as described below, the amount of spill available daily will be limited to 10% of the daily average flow. During the period of peak migration and on written notice of not less than three working days to the Licensee by a majority of the Designated Representatives (or by the Studies Coordination when a majority of the Designated Representatives cannot be contacted for their approval within a reasonable time), the amount of spill may be increased to not more than 20% of the daily average flow. Consistent with project design, spill may be directed by the Designated Representatives (or the Studies Coordinator when a majority of the Designated Representatives cannot be contacted for their approval within a reasonable period of time) to be made from surface spill facilities.

E. *Supplemental Spill.* If at the conclusion of the 30-day spill period provided for in Paragraph 3.A 80% of the run has not passed a dam, then supplemental spill shall be available at that dam. The amount of supplemental spill shall be determined by the election of either (a) until 80% of the run has passed the dam, the previously unspilled portion of water provided in Paragraphs 3.B and 3.C, or (b) for a period of 15 days or until 80% of the run has passed, whichever is sooner, an amount of water determined in accordance with Appendix B, line 3. If the Designated Representatives elect option (b) for use at Rock Island Dam, then the amount of water to be made available shall be determined by applying the ratio calculated under Paragraph 3.C to the water volume determined by use of Appendix B, line 3. Use of the supplemental spill shall be in accordance with Paragraph 3.D. If 80% of the migrating juveniles have not passed the dam, and the water provided for in Paragraphs 3.B. and 3.C. has been exhausted by the end of

the 30-day period, then the Designated Representatives shall elect option (b). The determination of whether 80% have passed the dam and any election of supplemental spill shall be made not later than the end of the 30-day period provided for in Paragraph 3.A. by a majority of the Designated Representatives or, if a majority is not available within a reasonable period of time, by the Studies Coordinator. This determination and election shall be communicated to the PUDs by written notice and shall include a brief statement of the facts relied upon in making the determination.

4. *Hatchery Production.* During the term of the studies, the Public Utility Districts shall make available the following hatchery production capacity. During the term of the studies, each PUD shall bear the operation and maintenance expenses associated with the operation at its own facility subject to the reallocation of such expenses among the PUDs by their agreement. Expenses of the fisheries agencies in operation and maintenance which are attributable to the PUDs under this Agreement shall be subject to audit by the PUDs.

Wells Hatchery: 25,000 pounds of capacity for steelhead trout, or equivalent loading of other species.

Turtle Rock/Rocky Reach Annex: 75,000 pounds of capacity for fall chinook salmon, or equivalent loading of other races.

Priest Rapids: In addition to the foregoing, three sections of the Priest Rapids spawning channel shall be converted to rearing facilities according to the plan set forth in the CH2M Hill Mid-Columbia Production Optimization Study. The approximate capacity of this facility when completed shall be 75,000 pounds of fall chinook salmon or equivalent loading of other races. Except as provided below with respect to "Other facilities," and except in accordance with Paragraph 9, this shall be Grant PUD's sole obligation to provide hatchery produc-

tion or rearing facilities during the 5-year term of this Agreement. Utilization of the Priest Rapids spawning channel also may be subject to any orders entered by the FERC in licensing of additional units for Project No. 2114.

Other facilities: Up to four additional sections of the Priest Rapids spawning channel shall be made available for rearing facilities, developed with reuse of the water from the first three sections of the spawning channel. These sections will be available, at the election of the PUDs, to provide 25,000 additional pounds of capacity for fall chinook or equivalent loading of other races. It also will be available, at the PUDs election, to make up any capacity deficit (as discussed below) for Wells, Turtle Rock/Rocky Reach or Priest Rapids as those are described above.

In the alternative, to obtain this additional capacity, the PUDs may elect to utilize any existing unused hatchery/rearing capacity in the Columbia River basin. If such election is made, the fisheries agencies agree to make such unused capacity available for the PUDs use, the reasonable operating and maintenance expenses of which production shall be borne by the PUDs. In the event that the additional four sections of the Priest Rapids spawning channel are not capable of producing the additional 25,000 pounds of capacity and/or making up the capacity deficit for Wells, Turtle Rock/Rocky Reach or Priest Rapids, then it shall be produced in any unused capacity available in the Columbia River basin.

The determination of the species to be produced shall be the decision of the state, tribal and federal fishery agencies following consultation with the PUDs and the FERC Staff.

The production of 200,000 additional pounds as noted above shall neither impair nor reduce the effectiveness of the existing hatchery production commitments of the

PUDs. The means for achieving these production increases shall be reviewed in advance by the state, tribal and federal fishery agencies, and annually thereafter. In the event that the loading rate estimates for Wells or Turtle Rock/Rocky Reach hatcheries or the first three sections of the Priest Rapids spawning channel are in error, and it is not physically possible to maintain, with application of the best operation and maintenance practices to optimize production levels, the production capacities defined above and produce healthy fish suitable for release, then additional capacity shall be provided by the PUDs according to the elections stated above. The loading rates used in this evaluation shall not be less than those now used in hatcheries/rearing facilities operated by federal and state fisheries agencies under similar conditions.

Grant PUD shall use its best efforts to complete the improvement of the spawning channel at Priest Rapids for the 1980 brood year; provided, however, that if sufficient numbers of eggs are not available from the fisheries agencies improvements of the spawning channel need be made only to the extent that eggs are available for production. For this purpose, the fisheries agencies will advise Grant PUD as to egg availability by November 1, 1980, and on each November 1 thereafter for that brood year.

5. Subject to the approval of a majority of the Studies Committee, the Public Utility Districts will designate a Studies Coordinator to coordinate the studies to be conducted in accordance with Appendix A. The Studies Coordinator shall coordinate the preparation of reports of the studies conducted.

6. The agencies of the State of Washington which are parties to this proceeding shall provide such permits and authorizations as are required to perform the studies described in Appendix A. The agencies also shall support

the Public Utility Districts in obtaining such permits and authorizations as are required from other state and federal agencies to perform those studies.

7. The Public Utility Districts shall use their best efforts to publish a draft report of each year's studies, as described in Appendix A, by October 1 of the year following each migration season. Reports of any field study conducted pursuant to this Agreement by any of the parties to these proceedings with respect to the spring migration in the Mid-Columbia shall be made available upon request to the other parties and staff for review and comment before publication or general circulation. Comments to any draft report shall be provided by all parties (and the FERC Staff) not later than 60 days following publication of the draft report. A final report shall be prepared within 90 days of the close of the comment period. Comments submitted shall be accepted in the report, or incorporated as an appendix to the report. All reports shall be filed with the Federal Energy Regulatory Commission.

8. All parties shall have full access to all data generated by, and in, the course of the studies. Subject to the control and supervision of the Studies Coordinator, all equipment used in the course of the studies shall be subject to inspection and observation by authorized representatives of any of the parties.

9. The Hearing scheduled for January 28, 1980, shall be cancelled. At any time after the completion of the first year of study and the availability of any report of study results, any two parties to this proceeding (including the FERC staff) may, on thirty days' written notice to the other parties, convene a settlement conference for the purpose of seeking, on the basis of the available study results and reports, modifications to the minimum flow or spill requirements described above, provided that a majority of the Studies Committee has recommended it.

Additionally, at the end of three years of study, any two parties may request, upon notice as provided herein, further hatchery production for the remainder of the study term, provided that the incremental mortality (as measured above natural mortality) attributable to the Mid-Columbia River dam system (as measured from the confluence of the Okanogan to the head of McNary pool) is determined, on the basis of data considered by the Studies Committee to have a high level of reliability, to be greater than 62%. The comparison of 62% shall be to the average of the mean mortalities determined from the studies. The natural mortality rate for the Mid-Columbia (as calculated on a per-mile basis) shall be based on the mortality measured in the Hanford reach from the area below Priest Rapids Dam to the head of the McNary pool. For the purpose of this paragraph the system and natural mortality levels shall be determined from at least two years of system mortality studies which are designed to achieve a high degree or reliability, and for which sufficient numbers of test fish are made available by the fisheries agencies. The system mortality tests shall not be conducted during periods in which the flows are substantially greater or less than the flows specified in Paragraph 2.

Additionally, at the end of two years of study, any two parties may request, upon notice as provided herein, such reasonable structural modifications as may be necessary for the installation of prototype by-pass systems at one or more dams, provided that a majority of the Studies Committee has recommended it.

In the event that any two parties believe that the PUDs have unreasonably rejected a recommendation of the Studies Committee to perform studies requiring expenditures in excess of $500,000, they may request a settlement conference.

The notice required by this Paragraph shall include a specific statement of the change requested to the Settle-

ment Agreement and shall briefly describe the reasons for the change. Within ten days after receipt of said notice, any other party may give similar notice as to other changes which should be considered. In the event that the settlement conference is unable to reach a resolution, any two parties may petition the Administrative Law Judge or Commission to modify the requirements of this Agreement on the basis of the available study results and reports developed from the study program provided for by Paragraph 1.

The use of 62% system mortality as the basis for modifying this Agreement is not intended to be a standard for determining ultimate mitigation levels at the conclusion of the study period; nor does it imply that 200,000 pounds of hatchery production constitutes adequate mitigation if system mortality is less than 62%. Neither does this Agreement to provide hatchery production constitute any admission by the PUDs that any mitigation in addition to that now specified in the PUDs' licenses is required of the PUDs, or that the issue of mitigation is before the Commission in this proceeding.

10. On the completion of the term of study provided for by this Agreement, or by the Agreement as it may be amended, any party may petition the Presiding Administrative Law Judge or the Commission for the issuance of an order establishing further procedural dates in this portion of the proceeding.

APPENDIX A

STUDIES

The following studies will be undertaken in 1980 by the Public Utility Districts. Methods and specific objectives will be developed with open exchange of ideas and information between PUD and agency personnel. Timing and emphasis of post-1980 studies will depend on the recommendations of the Studies Committee and upon results of the 1980 studies.

The constraints on testing and studies include the following:

1. Gravity is to be used as much as possible in bypassing or transporting fish.

2. Hatchery fish to be used in studies which require active movement will be used when smolting and ATPase levels appear acceptable.

3. Insofar as possible, hatchery fish to be marked should be marked at least three weeks in advance of use in tests.

Studies in 1980:

A. *Increased Production:*

1. ATPase and smolt condition monitoring.

2. Acceleration of spawning (including hormonal and photo period alteration).

3. Preliminary hatchery siting, including literature review and site surveys on the Mid-Columbia River.

B. *Survival Augmentation.*

1. Evaluation of Rock Island bypass and study feasibility of collection.

2. Development of bypass systems using forebay skimming.
3. Airlift evaluation in gatewalls at Rocky Reach (coordinated with John Day).
4. Review feasibility of transport and imprinting.
5. Monitoring of migrant distribution using gatewell dipping and hydroacoustic application.

C. *Mortality Estimates*

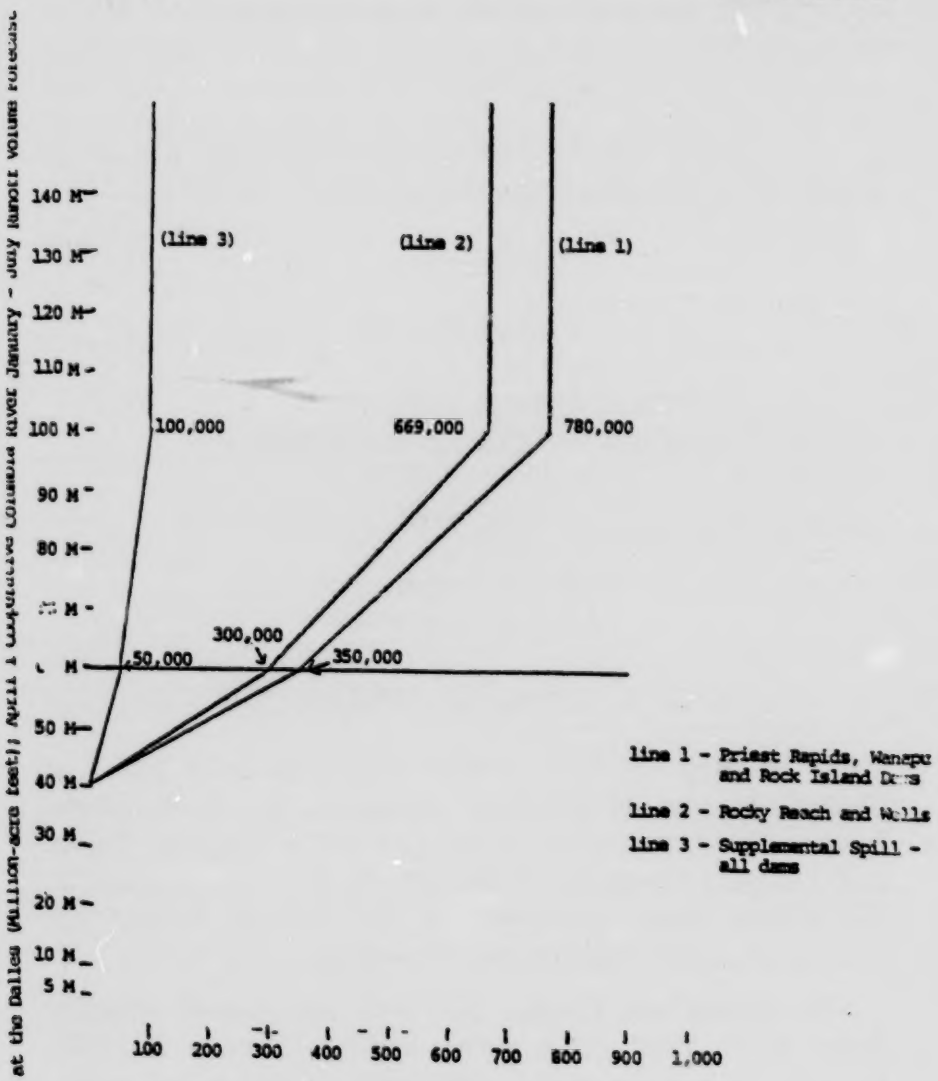
1. Wells turbine and spill studies shall have first priority in 1980.
2. Rocky Reach spill and turbine mortality.
3. System-wide and Hanford Reach mortalities.
4. If required and test fish are available, mortalities in connection with Wanapum sluiceway (unless this problem is alleviated through structural modifications at Wanapum).

Possible Studies After 1980 May Include the Following:

1. Continue migrant monitoring and implement hydroacoustics.
2. Mortality in skim spills.
3. Turbine and Project mortalities at Wanapum, Priest Rapids and first powerhouse Rock Island.
4. Continue studies of spawning acceleration.
5. Initiate transport pilot studies.
6. Effectiveness of split gates—Rock Island.
7. Evaluate collection and bypass at Rock Island.
8. Semi-natural rearing at Priest Rapids and Wells.

9. Annual evaluation of system-wide and Hanford Reach mortality.
10. Habitat, seeding and rearing in tributaries.
11. Data evaluation, coordination and modeling.
12. Predation study leading to management-scale tests.
13. Preliminary hatchery siting, including literature review and site surveys in non-Mid-Columbia areas, if Mid-Columbia River sites are not available.

APPENDIX B


at the Dalles (Million-acre feet) April 1 Cooperative Columbia River January - July Runoff Volume Forecast
140 M
130 M
120 M
110 M
100 M
90 M
80 M
50 M
40 M
30 M
20 M
10 M
5 M
(line 3)
(line 2)
(line 1)
100,000
669,000
780,000
300,000
50,000
350,000
line 1 - Priest Rapids, Wanapu and Rock Island Dams
line 2 - Rocky Reach and Wells
line 3 - Supplemental Spill - all dams
100
200
300
400
500
600
700
800
900
1,000

C. Notice of Issuance of Annual License

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project No. 943

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY, WASHINGTON

Notice of Issuance of
Annual License(s)

(January 4, 1980)

On January 18, 1977, Public Utility District No. 1 of Chelan County, Washington, Licensee for Rock Island Project No. 943, located on the Columbia River in Chelan and Douglas Counties, Washington, filed an application for a new license pursuant to the Federal Power Act and Commission Regulations thereunder.

The license for Project No. 943 was issued effective January 21, 1930, for a period ending January 20, 1980. In order to authorize the continued operation and maintenance of the project, pending Commission action on Licensee's application, it is appropriate and in the public interest to issue an annual license to Public Utility District No. 1 of Chelan County, Washington.

Take notice that an annual license is issued to Public Utility District No. 1 of Chelan County, Washington for the period January 21, 1980 to January 20, 1981, or until the issuance of a new license for the project, whichever

comes first, for the continued operation and maintenance of the Rock Island Project No. 943, subject to the terms and conditions of the original license. Take further notice that if issuance of a new license does not take place on or before January 20, 1981, a new annual license will be issued each year therafter, effective January 21 of each year, until such time as a new license is issued, without further notice being given by the Commission.

KENNETH F. PLUMB
Secretary

DC-A-18

Office-Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1365

In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PETITIONER

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the relicensing of a hydroelectric project invariably constitutes a "major Federal action[] significantly affecting the quality of the * * * environment," within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), therefore always requiring the Federal Energy Regulatory Commission to prepare an Environmental Impact Statement before issuing a new license.

2. Whether Section 6 of the Federal Power Act, 16 U.S.C. 799, requires the Commission to consider and decide all fishery protection issues before it issues a license, rather than issuing, with the licensee's consent, a license with "open ended" conditions which authorize the Commission to insert additional fish protection measures upon the completion of an ongoing comprehensive study of all fish-related issues by the Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1365

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PETITIONER

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

Respondent Federal Energy Regulatory Commission files this brief in support of the petition of the Public Utility District No. 1 of Chelan County, Washington for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and as modified on rehearing (Pet. App. 1a-22a, 74a-75a) is reported at 746 F.2d 466. The orders of the Federal Energy Regulatory Commission (Pet. App. 23a-73a) are re-

ported at 15 F.E.R.C. ¶ 62,187 (May 13, 1981); 19 F.E.R.C. ¶ 61,223 (June 4, 1982); and 21 F.E.R.C. ¶ 61,264 (Nov. 23, 1982).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1984. Petitions for rehearing were denied on October 30, 1984 (Pet. App. 74a-75a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, are set forth in Pet. App. 76a-78a, 78a-79a.

STATEMENT

In this case, the court of appeals set aside a new license issued to the original licensee by the Federal Energy Regulatory Commission on the ground that the Commission had failed to comply with governing statutory provisions. The questions raised by the petition challenge the correctness of that determination.

A. Statutory Structure

The Federal Energy Regulatory Commission (Commission or FERC) issues licenses under the Federal Power Act, 16 U.S.C. 791a *et seq.*, for the construction and operation of non-federal hydroelectric project works in the waters over which Congress has jurisdiction or on public land. Original licenses are valid for up to 50 years and contain conditions, both mandated by the statute and prescribed by the Commission, designed to regulate the project's operations. § 6, 16 U.S.C. 799. Section 6 further provides that

each license "shall be conditioned upon acceptance by the licensee of all the terms and conditions" of the Act "and such further conditions * * * as the Commission shall prescribe in conformity with [the Act]." After its issuance, the license "may be altered * * * only upon mutual agreement between the licensee and the Commission."

At the end of the term of the initial license, the Act gives the Commission several choices. The agency may either: (1) recommend to Congress federal takeover (except where, as here, a municipality is the original licensee); (2) issue a new license to the original licensee; (3) issue a new license to a new licensee; or (4) issue a nonpower license, withdrawing the project from power production altogether. §§ 14, 15, 16 U.S.C. 807, 808. The Commission has never issued a nonpower license. Until the Commission decides what course to follow on relicensing the agency may issue annual licenses to keep the project operating. An annual license must, however, contain the same terms as the expired license. *Ibid.*

B. The Proceedings Before The Commission

1. Petitioner, the Public Utility District No. 1 of Chelan County (Chelan), is the successor to the entity which, in January of 1930, obtained the license for the Rock Island Dam, one of six dams in the midsection of the Columbia River in Washington state. Towards the end of the Rock Island's 50-year license term, various fish and Indian interests petitioned the Commission to institute a proceeding aimed at modifying the operation of all six licensed dams, including Rock Island. The Commission granted the petition, *Public Utility District No. 2 of Grant County*, 6 F.E.R.C. ¶ 61,210 (Mar. 7, 1979). That proceeding resulted in the adoption of interim fish protection measures and the parties are now in ongoing pro-

ceedings, concentrating on developing permanent modifications. See 10 F.E.R.C. ¶ 61,257 (Mar. 20, 1980).[1]

In the meantime, in January 1980, Chelan's original license expired. After issuing two annual licenses, the Commission's delegate, the Director of the Office of Electric Power Regulation, issued a new 40-year license to Chelan. 15 F.E.R.C. ¶ 62,187 (May 13, 1981). On appeal, the Commission affirmed, 19 F.E.R.C. ¶ 61,233 (June 4, 1982), and thereafter denied rehearing, 21 F.E.R.C. ¶ 16,264 (Nov. 23, 1982).

2. In approving the issuance of the license to Chelan, the Commission first rejected the claim that the agency should not have relicensed the Rock Island Project because the Commission had not yet completed the Mid-Columbia case and had not fixed permanent fish conditions.

Rather, the Commission held that although the new license contained no long term fish protection measures, these matters were being considered in the Mid-Columbia proceeding and, in fact, the license incorporated the interim fish measures recommended in the Mid-Columbia proceeding. Moreover, because the license contained an "open ended" condition which had been accepted by Chelan at the time it accepted the license,[2] the Commission believed it was author-

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[1] An Administrative Law Judge of the Commission is currently conducting hearings to determine the type of fish protection devices to install on the Mid-Columbia dams and how the licensee should regulate the flow of the river to enable more fish to survive on their migrations to and from the Pacific. Meanwhile, the parties agreed on measures to improve the operation of the projects, excluding Rock Island, from the standpoint of fish protection.

[2] An "open ended condition" (termed a "reopener clause" by the court below, Pet. App. 13a) is a license article under

ized to amend the fish articles of the license at any time during its 40-year term when the Mid-Columbia proceeding was terminated and the final fish conditions were decided upon (Pet. App. 27a, 61a, 62a, 70a). 15 F.E.R.C. at 63,318; 19 F.E.R.C. at 61,438, 61,439; 21 F.E.R.C. at 61,733.

The Commission adopted this approach because these fish "problems demand a systemwide approach" and "open ended" conditions are designed "to implement any changes in project operation or structures that [the Commission] deem[s] necessary for the protection and enhancement of the fisheries resources when an adequate record has been certified to the Commission" (Pet. App. 61a). As the Commission further explained on rehearing, "in issuing new licenses for old projects, * * * we have often found it necessary to have the applicant and interested agencies conduct rather detailed fisheries studies of several years' duration" (*id.* at 70a). This is particularly important for (*id.* at 70a-71a (emphasis in original)):

> When there is only one applicant for the new license, it frequently makes sense to go ahead and issue the new license before the lengthy studies are complete, so as to put in effect sooner the new license conditions, which relate to *all* aspects of the project and in many cases strengthen the protection of other aspects of the public interest in the project.

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which the Commission reserves the right to change the operation of the project before the license expires.

The Commission in its order on appeal also rejected the assertion that relicensing could not go forward without an Environmental Impact Statement (EIS) as provided for by Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). On this aspect of the case, the Commission pointed out that an EIS is required only where the project sought to be licensed "significantly affects the quality of the environment" and that those seeking such a study here "ha[d] failed to identify any * * * impact caused by the issuance of the license" (Pet. App. 63a). The Commission noted further that (*ibid.*):

> The continuing impact of the project on the fisheries resource is being addressed in the separate proceeding. The license is adequately conditioned to provide for the protection of the environmental resources of the project area.

C. The Decision Of The Court Of Appeals

The Ninth Circuit reversed on both issues (Pet. App. 1a-22a, 74a-75a).

As to the Commission's obligations under NEPA, that court unequivocally held that an EIS is always "required prior to the decision to relicense the project" (Pet. App. 18a). The panel so ruled notwithstanding its recognition that the Rock Island Dam predated NEPA (except for a post-NEPA expansion for which the Commission had prepared an EIS, see Pet. App. 89a), and the fact that the court had found "no cases which have addressed this issue in the context of relicensing hydropower projects by FERC" (*id.* at 18a). The court also acknowledged that it

and other circuits had previously held that actions that were essentially phases of continuing activity, such as lease renewals of shipyards and parking lots and purchases of existing airports, do not require agencies to prepare EIS's under NEPA (Pet. App. 19a). The court sought to distinguish the situation here, however, on the grounds that "[r]elicensing is substantially equivalent to issuing an original license and one would assume" that NEPA applied (*id.* at 21a), and that a license renewal is "more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo" (*ibid.*). To further support this view, the court relied upon the fact that the Commission was obligated, before it issued a new license, to determine whether it should recommend federal takeover or a nonpower license. According to the court below, the takeover alternative, although not a realistic possibility in this case, is "a strong indication that FERC should have at its disposal all pertinent information, including that provided in an EIS" (*id.* at 20a).[3] Similarly, the court held, whether or not to issue a nonpower license "necessitate[s] the information prepared in an environmental impact statement" (*id.* at 21a).

The panel also reversed the Commission on the Section 6 issue. Starting from the premise that the relevant statutory scheme "require[s] FERC to examine fishery issues before issuance of a license" (Pet. App. 8a), at both the initial licensing stage and on relicensing (*id.* at 8a-10a), the panel concluded that

[3] The court subsequently amended its opinion, acknowledging that takeover was not a statutorily authorized alternative here since Chelan is a municipality. See 16 U.S.C. 828 (Pet. App. 75a).

FERC had failed to meet that statutory responsibility in this case. In the court's view, the Commission violated its statutory obligation to give "prelicensing consideration of fishery issues" (*id.* at 12a), by issuing a new license, with "open ended" conditions rather than deferring the issuance of a new license with permanent fish protection conditions, until those issues were fully resolved (*ibid.*). In the court's view, the Commission could in the meantime simply issue annual licenses to maintain the status quo (*ibid.*). According to the court "[n]o harm would accrue to the licensee, as annual licenses must incorporate the terms of the prior license" (*ibid.*).[4]

ARGUMENT

This case raises significant issues involving NEPA and the Federal Power Act directly affecting the Commission's proper exercise of its hydroelectric li-

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[4] The court of appeals reversed the Commission on two other grounds: the failure to require Chelan to file with its license application "Exhibit S," a report of the projected effect of the dam on fish (Pet. App. 15a-18a) and an alleged violation of the requirement to give "equal consideration" to fish under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839b, and the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.* (Pet. App. 14a-15a). However, both these holdings of the court fall if this Court upholds the Commission's view, that the "open ended" fish conditions it inserted in the new license adequately protect the interests in conservation of fish. Indeed, the court of appeals held that the Commission could not waive the filing of Exhibit S because the exhibit "is plainly designed to facilitate FERC's *duty* to consider fishery issues prior to licensing" (*id.* at 17a (emphasis in original)). Similarly, the court found that the Commission had violated the other statutes because it had failed to consider fish issues before issuing a license (*ibid.*).

censing responsibilities. In reversing the Commission by requiring an EIS for every relicensing, and appearing to restrict severely the use of "open ended" conditions in licenses, the court below has seriously hampered the Commission in effectively and promptly assuring the orderly development of hydroelectric projects. In these circumstances the court should grant the petition on both these issues.

1. a. An automatic rule that an EIS is required before the Commission may act on a new license application is not only legally unsound but would impose an enormous administrative burden on the Commission. Thus, over the last 64 years the Commission has licensed hundreds of projects each of which must, at some point, be considered for relicensing. Currently, there are 46 pending relicensing applications before the Commission, with another 241 licenses due to expire by the end of 1993. Overall, in the next 20 years, approximately 400 projects will be considered for renewal. Because each EIS requires, on the average, between one and two years to complete, the drain on the Commission's resources in preparing an EIS would be staggering without any correlative benefit to the environment if the view of the court below were to prevail. That view, moreover, finds no support in NEPA.

b. Section 102(2)(C) of NEPA, 42 U.S.C. 4332 (2)(C), requires that agencies prepare EIS's for "proposals for * * * major Federal actions" that significantly affect the environment. The statutory language does not define "proposal" or explain precisely what the threshold for an EIS is. However, the Conference Report indicates that Section 102 of NEPA was "based on section 102 of the Senate bill[,] [as] [t]here was no comparable provision in the

House [version]." H.R. Conf. Rep. 91-765, 91st Cong., 1st Sess. 8 (1969). The section-by-section analysis of the Senate bill explains that the requirements for an EIS attach when (115 Cong. Rec. 29085 (1969) (emphasis added)):

> Each agency * * * proposes *any major* actions, such as *project proposals*, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs * * *.

This congressional statement strongly implies that in the context of the Federal Power Act, NEPA requires an EIS for "project proposals," which involve construction or reconstruction or expansion of a dam, *i.e.*, some significant physical change, and does not apply to a situation where, as here, the "proposal," *i.e.*, the relicensing, involves no more than a determination as to who will operate the development for the next license term and under what conditions the dam will operate. There is no invariable rule that there will be a meaningful change at the expiration of a license term.

Indeed, up until this case, the courts have interpreted the EIS requirement as triggered only by some meaningful change in the status quo. For example, the Ninth Circuit itself pointed out in *San Francisco Tomorrow* v. *Romney*, 472 F.2d 1021, 1024 (1973):

> The Act does not by direct language or by implication call for retroactive application. In fact, the Council on Environmental Quality * * * states in its interim guidelines of April 23, 1971 that existing federal projects and programs are affected only by *further* major action, as follows:
>
> "11. Application of section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the section 102

> (2)(C) procedure should be applied to *further* major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to the enactment of the Act on January 1, 1970. * * * (Emphasis added) 36 Fed. Register 7727."

Again, in *Sierra Club* v. *Hassel*, 636 F.2d 1095 (5th Cir. 1981), the court of appeals was faced with the situation in which a hurricane had destroyed a bridge and the federal government sought to rebuild it. The Sierra Club claimed that, in rebuilding the bridge, the government should have assumed the status quo to be the area in question without the bridge and thus should have prepared an EIS. The Fifth Circuit disagreed, and, citing the Ninth Circuit's opinion in *City & County of San Francisco* v. *United States*, 615 F.2d 498 (1980), held that even though the bridge no longer existed "it was not unreasonable * * * to conclude that the status of the environment to be considered was that with the bridge in place * * * [t]he reconstruction project will only restore an environmental situation that had existed for [many] years" (636 F.2d at 1099).

Indeed, the Ninth Circuit in that very case, *City & County of San Francisco*, also rejected a claim that before leasing a shipyard, the government should also have considered the possibility of using the area as a deep water port, with allegedly fewer detrimental consequences to the environment. The court held that "a central purpose" of the lease was to keep the shipyard in sufficient condition to enable the Navy to assume immediate control in a national emergency and that the lease included such provisions (615 F.2d at 501). In that context, the Ninth Circuit ruled that "[i]t was not unreasonable to regard the leasing * * *

as a phase in an essentially continuing activity * * * [and] the Navy * * * [need not conduct itself] as if [it] were * * * establish[ing] * * * [the facility] for the first time" (*ibid.*). Accord, *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (1974).

Applying these principles here, the Commission correctly ruled that no EIS was mandated in this relicensing proceeding because the applicant proposed no changes in the project and, in any event, the only impact resulting from the the operation of Rock Island—the fish issue—was being resolved in a separate, ongoing proceeding conducted under the Federal Power Act.[5] As the Commission put it: "[w]e find that the environmental record already compiled is adequate to support our order issuing a new license * * * especially in light of our decision to include open-ended conditions pertaining to fisheries * * *" (Pet. App. 70a).

c. While the court below recognized that "viewed narrowly," relicensing represents a continuation of the status quo and, therefore, in that sense, the Com-

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[5] The fact that the Commission in this case is reviewing fish issues in the Mid-Columbia proceeding and on relicensing generally considers and inserts new fish protection measures does not mean that the agency must prepare an EIS on the matter. In relicensing cases, the Commission undertakes this responsibility under its Federal Power Act obligation to insert appropriate conditions in licenses without any special proceeding. § 15(a), 16 U.S.C. 808(a). On the other hand, under NEPA, the Commission must undertake an elaborate procedure involving preparation of a detailed comprehensive statement, notice and comment and public participation. *Friends of the River* v. *FERC*, 720 F.2d 93, 105-106 (D.C. Cir. 1983) (citing *Calvert Cliffs Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)).

mission's holding comported with the case law (Pet. App. 19a), it sought nevertheless to sustain its contrary ruling on the ground that relicensing is by definition something more. A principal rationale for the court's view was that "whether a non-power license is necessary necessitate[s] the information prepared in an environmental impact statement" (*id.* at 20a-21a). This analysis, however, rests on a slim reed, since it altogether misconceives the impact of the potential issuance of a nonpower license.

In the first place, there was not the slightest possibility that a nonpower license would issue in this case since Chelan was the only applicant on relicensing and no party requested such a result (Pet. App. 7a-8a). The court's argument is also flawed in a broader sense since the issuance of a nonpower license is of nothing more than historic interest in the current state of hydroelectric power development.

Congress first gave the Commission authority to issue nonpower licenses in the 1968 amendments to the Federal Power Act (Pub. L. No. 90-451, 82 Stat. 616 *et seq.*); the 1920 Act provided for recapture and relicensing as the only possible courses of action when a license expired. In requesting the grant of new authority to issue a nonpower license, the then Chairman of the Commission indicated that it was necessary because a licensee may wish to abandon the project or there is no longer any need for the project as a source of electricity. Similarly, other uses, such as water supply, would be superior to having the project continue to produce power. Letter from Lee C. White, Chairman, FPC, to Honorable John W. McCormack, Speaker of the U.S. House of Representatives (Aug. 28, 1967). In fact, the relicensing provision of the statute (§ 15(b), 16 U.S.C. 808(b)) incorporates that legislative purpose.

This notion, that hydroelectric projects might become expendable, comported with the general view at that time that "hydroelectric power promises to occupy a relatively small place in the world's supply of energy." *Udall* v. *FPC*, 387 U.S. 428, 446 (1967). In that setting, a nonpower license was meant to serve as a temporary measure in the transfer of a project from power production to a governmental or private entity for other uses. But that situation has never materialized and recently, hydroelectric power has assumed a vital role in meeting national energy needs. In fact, the Commission has never issued a nonpower license. And in light of the incentives Congress enacted for hydroelectric projects,[6] nonpower licensing is no longer a viable alternative. Indeed, in an era of increasing hydroelectric power, abandonment of existing projects is not a realistic eventuality.[7]

At bottom, in imposing a mandatory EIS requirement, the panel rested its view that an EIS was always required on relicensing on an ipse dixit—that relicensing is "more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo," and "is substan-

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[6] *E.g.*, Sections 213 and 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 823a and 824a-3, and the Energy Security Act, 16 U.S.C. 2705(d).

[7] Thus, the court's quotation (Pet. App. 21a) of the 1968 letter from Chairman White, that on relicensing the Commission must examine the "best use" of each project, from which the court concluded that a relicensing is the same as an original license proceeding, must be read in its proper context. For one thing, on initial licensing the Commission may deny authorization to construct the dam; on relicensing removal of a dam is unrealistic. Moreover, as noted (pages 13-14, *supra*), in 1968 the experts thought that projects could be put to better uses than power production.

tially equivalent to issuing an original license" (Pet. App. 21a).[8] To be sure, there may be instances where an EIS is a necessary prerequisite before issuing a new license or a license amendment during the license term. In fact, an EIS was prepared as to the Rock Island project involved here when Commission authorization for a new generator was granted in 1974 (Pet. App. 89a). But that is hardly enough to support the absolute and unyielding rule adopted by the court below.

c. In sum, the panel's NEPA ruling falls squarely within this Court's admonition in *Vermont Yankee* that, "[t]o make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978) (citing *NRDC* v. *Morton*, 458 F.2d 827, 837-838 (D.C. Cir. 1972) (NEPA does not require agencies to consider "remote and speculative possibilities")). Here, as well, "to compel [the Commission] to formulate an EIS * * * would trivialize NEPA[]." *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980). As this Court recently stated in *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 100 (1983), "Congress did not enact NEPA * * * so that an agency would contemplate the environmental impact of an

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[8] This approach ignores the legislative history of the 1920 Act that the inquiry on relicensing is more limited than at the time of issuance of the original license. See, *e.g.*, 53 Cong. Rec. 3353 (1916) (statement of Sen. Norris). Indeed, this Court left open the issue in a related context in *Escondido Mutual Water Co.* v. *LaJolla Band*, No. 82-2056 (May 15, 1984), slip op. 13, 14 n.23.

action as an abstract exercise." But that is precisely what the court of appeals has required in this case.

2. The panel below also seriously erred in its ruling on the Section 6 issue, particularly because it is difficult to gauge the full scope of the court's ruling. Because its limits—if any—are not clear, the opinion below engenders uncertainty, and this uncertainty may have a broad and unjustified impact. Thus, of 125 licenses the Commission issues each year, approximately 100 contain "open ended" conditions, generally, as here, dealing with fish protection issues.

a. Section 6 imposes on the Commission the duty to "express[] in said license" all the "terms and conditions and the [licensee's] acceptance thereof." The statute further mandates that once the license is issued it may not be "altered * * * [except] upon mutual agreement between the licensee and the Commission." In precise language, therefore, Section 6 requires the Commission to state the rules and conditions under which the licensee will operate and the licensee must accept them before commencing operations, or else no license will be issued.

The legislative history fully supports the thrust of the plain language. It underscores that the purpose of Section 6 was to inform licensees at the outset as completely as possible what the situation would be during the entire term of the license. See, *Water Power: Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. 72-73 (1918) (statement of O.C. Merrill). An "open ended" condition, inserted at the outset of the license term, achieves that objective by notifying the investor that, sometime during the term of the license, the Commission will insert specific conditions for such matters as fish protection as those requirements become clear. Thereby, the

licensee's expectations, as of the time it accepts the license, are not upset.

Indeed, later congressional pronouncements put the validity of "open ended" conditions beyond question. In 1968, Congress considered an amendment to the Federal Power Act which would have permitted the Commission to review licenses during their term and modify project operations, if necessary. The House Interstate and Foreign Commerce Committee, however, deleted the provision as "unnecessary in light of the * * * Commission's power to insert so-called open-end[ed] conditions in hydroelectric power project licenses." H.R. Rep. 1643, 90th Cong., 2d Sess. 2 (1968). Later, in the floor debates, all the Congressmen who participated endorsed a letter from the Commission regarding its authority to impose "open ended" conditions.[9]

Manifestly, therefore, Congress was well aware of the Commission's view of its Section 6 power, and endorsed it.[10] As the Commission's letter to Congress

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[9] That letter stated that "[i]n recent years the Commission, aware that it is unable, at the time of license issuance, to solve all of the problems that subsequently may have to be met * * * has imposed * * * limited subject open-end[ed] conditions * * *. Typical * * * conditions related to water releases, joint use of project reservoirs and properties, * * * coordination of project operation * * * with other projects and power systems[,] and construction * * * of facilities for the conservation * * * of fish and wildlife * * *." 114 Cong. Rec. 21440-21441 (1968).

[10] Although the Congress that endorsed "open ended" conditions was not the one that enacted the Federal Power Act, this Court has held that while "the view of a later Congress does not establish definitively the meaning of an earlier enactment, * * * it does have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784-785 (1983) (citing *Bowsher* v.

made clear, it could not at license time solve all the myriad problems attendant upon the operations of hydroelectric projects. Indeed, the solution to some questions, such as coordination with future projects, cannot be known at the time of the license's issuance. The power of the Commission to insert "open ended" conditions under Section 6 is thus particularly valuable where the Commission, as is often the case, cannot conduct extensive prelicensing studies. In such circumstances, the only way the Commission can effectively ascertain the impact of the project is to monitor its actual operation.[11]

These are the considerations which prompted the Commission's actions here. Thus, it issued the new license to Chelan incorporating conditions based on what at that time (1981) was the latest available data (*i.e.*, the interim Mid-Columbia settlement).[12]

Merck & Co., 460 U.S. 824, 837-838 n.12 (1983) (especially where, as here, Congress was considering an amendment to the original statute)).

[11] The Commission's interpretation of Section 6 is consistent, at least in principle, with the recently expressed view of the District of Columbia Circuit in *Pacific Gas & Electric Co.* v. *FERC*, 720 F.2d 78 (1983). As the court there stated (*id.* at 83-84):

> FERC's power * * * to reserve the right to require future alterations enables the Commission to accord section 6 the scope its terms indicate without unreasonably undermining the [Federal Power Act's] broader purpose * * *. FERC has discretion under section 6 to restrict license terms * * * and is also authorized * * to impose additional license conditions at its discretion.

[12] The panel's invocation of *Udall* v. *FPC*, 387 U.S. 428, 440 (1967) (Pet. App. 9a-10a), is therefore inapposite. In *Udall*, the Commission had not taken any evidence on whether federal development should occur or on the impact of a new dam

b. It may be said, however, that the petition should not be granted on the ground that the Ninth Circuit's opinion does not depart from these principles; that, in fact, the panel did not outlaw all "open ended" conditions, but only those which are not predicated upon a prelicensing consideration and evaluation (see, *e.g.*, Pet. App. 10a-12a). But if that is all the court below meant to hold, then it should have affirmed here since the Commission did consider the fish issues by basing its 1981 conditions on the best information then available.

Moreover, while reversing the Commission's use of its "open ended" conditioning power to make changes after a projected 10 year study, the court below (Pet. App. 13a) reaffirmed its precedent in *California* v. *FPC*, 345 F.2d 917 (9th Cir.), cert. denied, 382 U.S. 941 (1965), that the Federal Power Act permits the agency to incorporate a "reopener clause" to be invoked after 20 years. In so doing, the court gave no rationale for this distinction.[13] Nor, for that matter,

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on the river at issue (387 U.S. at 434 (these issues were "[un]explored in this record")). Here, the Commission was conducting the Mid-Columbia proceeding. *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), cited by the court (Pet. App. 11a-12a) is also inapposite, since there the Commission had ignored and failed to require submission of relevant evidence. 354 F.2d at 620-624. No similar claim can be made here.

[13] The court's narrow reading of *California* flies in the face of the language in that case that "section 6 * * * must not be given a construction which is impracticable of application" and that where the Commission only knows at a later time the full needs of the public interest, the agency may apply a "reopener clause" (345 F.2d 924; see Pet. 18). The court's present distinction between that case and this one creates even

did the court indicate the time limit for permissible as opposed to invalid "open ended" conditioning clauses.

c. Furthermore, even if the court's holding were interpreted to mean that "open ended" conditions are proper only if the initial condition operates for a significant period of time, that ruling seriously hampers the Commission in its administration of the Federal Power Act. This is underscored by three recent cases, *City of New Martinsville*, 27 F.E.R.C. ¶ 61,359 (June 4, 1984); *Swanton Village*, 27 F.E.R.C. ¶ 62,181 (May 24, 1984); and *Potomac Edison Co.*, 27 F.E.R.C. ¶ 62,184 (May 24, 1984), in which the Commission issued licenses with "open ended" conditions where valid data necessary for imposing environmental protection measures would be available only after a study of the actual operation of the projects. Under even a narrow reading of the ruling of the court below this approach appears to be open to serious question: the Commission may either license projects in the hope that a licensee will subsequently agree to later changes, impose conditions based on theoretical guesswork without the best available data, or not issue a license at all. There is not the slightest evidence that Congress meant to so

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more confusion since it leaves unclear how complex and detailed the prelicensing evaluation must be to pass the court's test. Thus, in distinguishing the "open ended" condition found valid in its earlier decision in *California* v. *FPC*, *supra*, the court noted that there the license incorporated "[s]pecific fish protection measures," and all the reopener clause did was to offer the Commission "the right to modify *those* conditions after twenty years" (Pet. App. 13a (emphasis added)).

hamper the Commission in the exercise of its statutory authority.[14]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1985

I authorize the filing of this brief.

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[14] Indeed, the court of appeals held that the Commission could not, without running afoul of Section 6, use a "reopener clause" to incorporate into the new license the interim fish measures in the Mid-Columbia proceeding and change them when Mid-Columbia became final (Pet. App. 14a). At the same time, the court held that the agency should have used the "reopener clause" in Chelan's expired license to substitute the then existing fish conditions with those of Mid-Columbia. The illogic of this position compounds the Commission's difficulty with the decision below.

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No. 84-1365

In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PETITIONER

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission is required under the National Environmental Policy Act to prepare an environmental impact statement in connection with its grant of a new 40-year hydropower license for an existing dam, where it is undisputed that the dam causes significant environmental harms and where the relicensing provisions of the Federal Power Act require a de novo evaluation of the project's harms and benefits.

2. Whether the court of appeals' decision in this case bars the use of "reopener clauses" that permit the Commission to require post-licensing modifications in a dam's operations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a, 74a-75a) is reported at 746 F.2d 466. The orders of the Federal Energy Regulatory Commission (Pet. App. 23a-57a, 58a-67a, 68a-73a) are reported at 15 F.E.R.C. ¶ 62,187, 19 F.E.R.C. ¶ 61,223, and 21 F.E.R.C. ¶ 61,264, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1984. Petitions for rehearing were denied on October 30, 1984 (Pet. App. 74a-75a). On January 23, 1985, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to February 27, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the relicensing of the Rock Island Dam hydropower installation by the Federal Energy Regulatory Commission.[1] Rock Island Dam is located on the upper Columbia River. Major tributaries above the dam are used by anadromous fish, such as chinook, coho and sockeye salmon and steelhead trout, for spawning and rearing. These fish populations have historically supported commercial, recreational, and tribal fisheries in several states and off the coast of Canada. Because Rock Island lacks facilities to allow for the passage of juvenile fish migrating downstream, the fish suffer significant mortalities when they pass through the dam's power turbines.

Rock Island was originally licensed for a 50-year term in 1930. Petitioner, the licensee of the project, applied for a new license in 1977. After granting two annual licenses, the Commission issued a new 40-year license to petitioner in 1981. The Secretary of Commerce (representing the National Marine Fisheries Service (NMFS)) and the Yakima Indian Nation sought review of the Commission's order. Petitioner intervened in support of the order, and the National Wildlife Federation and the Washington State Departments of Fisheries and Game (Washington) intervened in opposition to it. The court of appeals set aside the license on the grounds that the Commission had failed to give adequate pre-licensing consideration to fish-protection issues and had failed to prepare an environmental impact statement (EIS).

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[1]The Federal Energy Regulatory Commission succeeded to the functions of the Federal Power Commission effective October 1, 1978 (see 42 U.S.C. 7172). The term "Commission" will be used interchangeably to refer to both agencies.

1. a. The Commission distributed petitioner's 1977 license application to NMFS for comments, stating that petitioner's "Exhibit S" — its report on fish and wildlife impacts — had not yet been filed but that it would "also be distributed, after it is submitted and found to be acceptable" (C.A. App. 3). NMFS and Washington intervened in the licensing proceeding in 1978 and requested that any new license require protection for migrating fish based on the best available technology (*id.* at 29). NMFS also stated that the Commission must consider "the beneficial impact of returning the river to a free-flowing condition with unrestricted fish passage and restoration of spawning and rearing areas for anadromous fish" (*id.* at 34).

In 1981, the Commission's Director of Electric Power Regulation issued a new 40-year license to petitioner (Pet. App. 23a-57a). During the more than two years following NMFS's intervention, the Commission had failed to advert to fish-protection issues, to hold any hearings, or to prepare an EIS; nor had it required petitioner to submit an Exhibit S. The new license included a standard "reopener" clause (Article 15) allowing the Commission to require "reasonable modifications of the project structures and operation" for the purpose of "conservation and development of fish and wildlife resources" (*id.* at 50a). The only project-specific fish and wildlife condition included in the new license was Article 38, which further extended the date for submission of the missing Exhibit S to May 1984 (C.A. App. 118).

b. NMFS, joined by several interested private and governmental organizations, appealed to the Commission. They maintained that the Director's order did not satisfy the Commission's legal obligation to give full consideration to fish impacts prior to licensing and suggested submitting the matter to an administrative law judge for proceedings to develop specific license conditions, including installation of turbine bypass systems (C.A. App. 148-150).

Acting without a hearing, the Commission affirmed issuance of the license to petitioner (Pet. App. 58a-67a). The Commission recognized the "continuing impact of the project on the fisheries resource" (*id.* at 63a) and the "unknown[]" (*id.* at 65a) extent of that impact. Nonetheless, the Commission concluded that it was not required to address fish impacts or fish-protection measures in the licensing proceeding because they were being considered in the "Mid-Columbia proceeding" (*id.* at 61a). In the Mid-Columbia proceeding, which is a consolidation of license modification petitions filed in 1976 and 1978, the Commission is considering various fish-protection proposals with respect to five dams, including Rock Island (*id.* at 109a-120a). The purpose of the proceeding, as stated by the Commission, is to determine whether "reasonable modifications" (*id.* at 111a) of the licenses "should be required for the remainder of the license terms" (*id.* at 119a).[2] The Commission concluded that it was not required to prepare an EIS in connection with its relicensing of Rock Island because fish impacts were being considered in the Mid-Columbia proceeding and no new adverse environmental effects would be caused by relicensing (*id.* at 62a-63a). On rehearing, the Commission adhered to its earlier decision essentially for the same reasons (*id.* at 68a-73a).

2. a. The court of appeals set aside the licensing order (Pet. App. 1a-22a, 74a-75a). The court reasoned that the law is "well defined" — "[*p*]*rior* to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures" (*id.* at 10a (emphasis added)). Because it was "undisputed that in

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[2]The dams' licensees, including petitioner, have argued in the Mid-Columbia proceeding that, notwithstanding the reopener clauses in their licenses, "the Commission lacks the authority to require modifications in the current minimum flows * * * without their consent" (Pet. App. 111a).

this proceeding the FERC did not undertake this obligation prior to issuing the license" (*ibid.*), its order could not stand. The court concluded (*id.* at 14a-18a) that the Commission's failure to consider fish-protection issues prior to licensing violated the Federal Power Act (16 U.S.C. 791a *et seq.*), the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 837 *et seq.*), and the Commission's own regulations (18 C.F.R. 4.41 (1976)).

The court rejected the argument that deferral of fish-protection issues pending completion of the ongoing Mid-Columbia proceeding was sufficient to satisfy the Commission's duty to address these issues prior to granting a license (Pet. App. 12a-14a). Although it recognized the importance of addressing these issues "with a view to the total system" of dams (*id.* at 12a), the court concluded for a number of reasons that the Commission's complete failure to consider these questions in the Rock Island licensing proceeding was unlawful. First, the Federal Power Act itself requires prelicensing consideration of fish-protection issues (*ibid.*). Second, the Commission could have continued issuing annual licenses to petitioner to preserve the status quo while the Mid-Columbia proceeding continued (*ibid.*). Third, the Commission's discretion to impose reasonable modifications pursuant to reopener clauses in the Mid-Columbia proceeding was more circumscribed than its discretion to impose operating conditions in the licensing proceeding itself (*id.* at 13a-14a). Finally, deferral of fish issues reduced incentives to address the questions in a timely fashion, as the licensee, once it has obtained a license, "may very well attempt to forestall the imposition of protection measures" because of their adverse impact on power production (*id.* at 14a).

b. The court of appeals also ruled that the Commission must prepare an EIS prior to relicensing the Rock Island project (Pet. App. 18a-22a). The court reasoned (*id.* at 21a)

that the Federal Power Act contemplates "much more than a mere continuation of the status quo when the decision is made to relicense" — "[r]elicensing * * * is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo." Post-licensing consideration of these issues in the Mid-Columbia proceeding could not, in the court's view, satisfy the Commission's obligation to prepare an EIS prior to licensing Rock Island (*id.* at 21a-22a).

c. In denying rehearing (Pet. App. 74a-75a), the court clarified that federal takeover of the project is not an option in this case because the licensee is a municipality.

3. The Mid-Columbia modification proceeding has continued, but with little progress toward ultimate resolution of the fishery issues. An interim settlement providing for a five-year study program and other measures was approved by the Commission in 1980 (Pet. App. 121a-126a). In 1981, the fishery agencies moved to set aside the agreement, citing the lack of progress toward fish protection (C.A. App. 192-232). The parties have since proceeded on the basis of annual stipulations regarding studies and dam operations. These effectively superseded the interim settlement agreement which, in any event, expired by its own terms in 1984. There is currently no schedule for long-term resolution of fishery issues at the mid-Columbia dams. No evidentiary hearings have been held during the six years of the proceeding, though a limited hearing is scheduled for June 1985 to consider petitioner's opposition to further annual stipulations with respect to Rock Island.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner argues (Pet. 12-15) that no environmental impact statement is required because relicensing of Rock Island represents only a continuation of the status quo. This view fails to take account of the obligation imposed on the Commission by the Federal Power Act to conduct a de novo assessment of the harms and benefits of a project and of its operating conditions in deciding whether to issue a new license, just as it must conduct such an assessment when deciding whether to issue the initial license for a project. The relicensing decision is therefore much more than merely a continuation of the status quo. It represents a break with the past and a fresh look at whether and under what conditions a hydropower installation should operate. Where, as here, the installation significantly affects the environment, the National Environmental Policy Act (NEPA) requires that the Commission prepare an EIS before issuing a new license.

a. Under Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), federal agencies must prepare environmental impact statements with respect to all "major Federal actions significantly affecting the quality of the human environment." It is undisputed, and the court of appeals found (Pet. App. 3a), that Rock Island does have "a significant impact on the environment, especially anadromous fish runs," because of the "significant number of juvenile salmon and steelhead" that die in the course of attempting to pass through the installation's turbines. Evidence in the administrative record (C.A. App. 269-270) shows that the mortality rate for juvenile fish passing the dam is likely to be between 10 and 30 percent.

b. Given this significant adverse impact on the environment, the only question is whether relicensing of Rock Island is a "major Federal action" within the meaning of Section 102(2)(C). The court below, as it noted (Pet. App. 18a), is the first court to have addressed the applicability of

the EIS requirement to relicensing of hydroelectric power installations; accordingly, there is no conflict requiring resolution by this Court.[3] In any event, the court of appeals' factbound decision is correct.

Section 15(a) of the Federal Power Act (16 U.S.C. 808(a)) authorizes the Commission "to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee." Congress did not contemplate the automatic reissuance of a new license containing the same conditions as the old one to the old licensee. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *FPC*, 510 F.2d 198 (D.C. Cir. 1975). Rather, the Commission must impose in the new license whatever conditions are currently necessary to meet the public interest standard set forth in Section 10(a) of the Act (16 U.S.C. 803(a)).[4]

When it amended Section 15 of the Act in 1968, Congress made it clear that the Commission's inquiry on relicensing must represent a de novo balancing of all relevant harms and benefits, analogous in this respect to the original licensing decision itself:

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[3]Petitioner (Pet. 12-13) and the Commission (FERC Br. 10-12) rely on cases holding that mere continuation of the status quo does not trigger the obligation to prepare an EIS under NEPA. These cases are inapposite because of the special requirements of the Federal Power Act, which mandate complete reconsideration of a hydroelectric project on relicensing. None of the cases relied on by petitioner and the Commission involve situations where a federal agency was required by Congress (wholly apart from NEPA) to undertake a fresh evaluation of the project in question.

[4]Section 10(a) provides that any approved project must "be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes."

> *Just as in the case of original licensing* the controlling criteria would be the comprehensive development standard of section 10(a) of the Federal Power Act. In view of this fact the relicensing proceeding would be deemed to involve "initial licensing" within the context of the Administrative Procedure Act rather than "license renewal."

H.R. Rep. 1643, 90th Cong., 2d Sess. 5 (1968) (emphasis added). The standard mandated by Section 10(a) (see note 4, *supra*) requires the Commission to consider all beneficial public uses of the waterway, including fishery uses. See *Udall* v. *FPC*, 387 U.S. 428, 440 (1967).[5] The Commission itself, which proposed the 1968 amendments, understood at that time that a full reevaluation must be made at the time of relicensing.[6] As the Chairman of the Commission stated (H.R. Rep. 1643, *supra*, at 6 (emphasis added)):

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[5]The Court stated in *Udall* (387 U.S. at 450):

> The test [under Section 10(a)] is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including * * * the preservation of anadromous fish for commercial and recreational purposes * * *.

[6]Though it did not urge the point in its brief below, the Commission now contends (FERC Br. 15 n.8) that "the inquiry on relicensing is more limited than at the time of issuance of the original license." The legislative history cited by the Commission does not even advert to the issue, let alone support the Commission's argument. *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, No. 82-2056 (May 15, 1984), slip op. 13-14 n.23, cited by the Commission (FERC Br. 15 n.8), is not relevant to the scope of the Commission's inquiry on relicensing under Sections 10(a) and 15(a) of the Act. The Court there raised only the question whether Section 4(e) of the Act, relating to the imposition of initial license conditions by the Secretary of the Interior for projects on Indian reservations, is applicable on relicensing.

> The Congress limited the maximum term of any license issued by the Federal Power Commission to 50 years and thereby preserved for the Nation, acting through subsequent Congresses, *a full opportunity to reevaluate the best use of each project upon expiration of the license*. We now recommend that Congress fix appropriate procedures for the reevaluation of each project in light of contemporary and prospective public needs.

c. Under the Federal Power Act, then, the Commission must start from a clean slate in deciding whether to relicense a particular project. The choice of licensee, the operating conditions to be imposed on the project, and indeed whether the dam should be permitted to generate power at all,[7] must all be fully reevaluated in light of the current and future public interest. This is no mere continuation of the status quo — it represents a new commitment of a public water resource. Nor may the Commission adopt the prior licensee's application on a pro forma basis. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 510 F.2d at 204 n.21. The legislative history of NEPA cited by the Commission (FERC Br. 10 (emphasis omitted)) in fact supports the court of appeals' decision: " 'project proposals * * * or expansion or revision of ongoing programs' " are within Section 102(2)(C). Relicensing pursuant to the de

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[7]The Commission's argument (FERC Br. 13) that nonpower licenses are of purely historical interest is erroneous. Only last Term, the Court considered a case where some of the respondents had sought such a license. *Escondido Mutual Water Co.*, slip op. 3 & n.5. Indeed, whether to issue a nonpower license seems to be precisely the sort of issue that should be explored in an EIS. See, *e.g.*, Council on Environmental Quality, Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. 1502.14(d) and (f) (EIS must include analysis of "the alternative of no action" as well as "mitigation measures not already included in the proposed action or alternatives"). In any event, the court of appeals' reference to nonpower licenses is purely dicta in view of the other factors that must be considered on relicensing.

novo review requirement of Section 15(a) of the Federal Power Act plainly constitutes either a proposal itself or the revision of an ongoing program for purposes of NEPA.

Curiously, the Commission recognizes (FERC Br. 15) that "there may be instances where an EIS is a necessary prerequisite before issuing a new license." Apparently the Commission would apply this requirement only to new construction. What the Commission fails to recognize, however, is that conditions of operation may be a much more important factor affecting the viability of fish resources than new construction. At Rock Island, for example, requiring petitioner to take measures to assist juvenile fish in avoiding the turbines during their migration would lead to greatly reduced mortality rates over the 40-year life of the license. An EIS focusing on ways to reduce fish mortalities, long sought by NMFS, Washington and others, would not trivialize NEPA but rather would assist the Commission in making the required determination of whether to impose new license terms and conditions.[8]

d. Petitioner's (Pet. 10-11) and the Commission's (FERC Br. 9) complaints regarding the administrative burden imposed by the court of appeals' decision are speculative and unconvincing. The petition does not seek review of the court of appeals' holding that the statutory and regulatory

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[8]Petitioner's (Pet. 14) and the Commission's (FERC Br. 15-16) reliance on *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is misplaced. There, the question was whether an EIS should have included consideration of alternative sources of energy; here, the question is whether an EIS is required at all. The court of appeals held only that the Commission must prepare an EIS. Any consideration of the alternatives that must be analyzed under it is premature. In any event, operational modifications to the project for the purpose of protecting anadromous fish — which would of course be considered in the EIS — are undoubtedly within the realm of the feasible.

framework governing relicensing requires prelicensing consideration of fish-protection issues (see pages 12-14, *infra*); the incremental burden of preparing an EIS as well should not be significant. In addition, an EIS will be required only where a particular dam's operations significantly affect the environment; the court did not hold that an EIS is required for every relicensing. Relicensing proceedings, moreover, are time-consuming even where an EIS is not prepared. In this very case, four years passed between petitioner's application and the Commission's issuance of its initial decision even though there was no competing applicant. It should not prove difficult to complete the EIS within the existing time period already required for relicensing. Finally, even if EIS preparation is burdensome for the agency, Congress has made the judgment in NEPA that an EIS is required. This judgment cannot be overridden merely for the sake of administrative convenience.

2. a. The second question presented by petitioner (Pet. i) is whether the Commission may issue a license containing a reopener clause allowing the Commission to add conditions to the license at a later date. The question is a peculiar one, as the court below did not bar the use of reopener clauses, nor did any of the parties urge such a result. The court's holding (Pet. App. 10a) is that "[p]rior to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures." The primary reason given for this holding was that it is required by the Federal Power Act and other applicable statutes; this requirement alone would be sufficient to uphold the court of appeals' decision. As one of several supporting reasons, the court pointed to the Commission's more narrow authority in the Mid-Columbia proceeding as compared to the relicensing proceeding (see page 5, *supra*). Petitioner apparently takes issue only with the court of appeals' dicta concerning the Commission's discretion in

the Mid-Columbia proceeding, without attacking the judgment. There is no basis for the Court's review in such circumstances. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

In any event, the court did not, by way of dictum or otherwise, bar the use of reopener clauses.[9] Rather, the court determined that reopener clauses alone cannot substitute for prelicensing consideration of fishery issues (Pet. App. 12a-14a). The court's reasoning was merely that the Commission's authority to impose fish-protection measures pursuant to reopener clauses, as in the Mid-Columbia proceeding, is more narrow than its authority in a relicensing proceeding. This is undoubtedly correct, for only "reasonable modifications" may be imposed pursuant to reopener clauses; more substantial changes may constitute "amendments" to the license, which are prohibited absent the licensee's consent (Section 6 of the Act, 16 U.S.C. 799).[10] In a relicensing proceeding, by contrast, the Commission is

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[9]The Commission finds (FERC Br. 16) that it is "difficult to gauge the full scope of the court's ruling." The Commission's difficulty appears to arise because of its misreading of the court's opinion. It is difficult to imagine how, in the posture of this case, the court could have barred the use of reopener clauses, for no new condition has been imposed here pursuant to such a clause. Because the court did not forbid the use of reopener clauses, its decision does not conflict with the earlier decision of the same court of appeals in *California* v. *FPC*, 345 F.2d 917 (9th Cir.), cert. denied, 382 U.S. 941 (1965), or with the decision in *Pacific Gas & Electric Co.* v. *FERC*, 720 F.2d 78 (D.C. Cir. 1983), both of which merely upheld the Commission's authority to impose reopener clauses.

[10]Petitioner itself has argued in the Mid-Columbia proceeding that the modifications sought by NMFS would constitute prohibited amendments to its license (C.A. App. 54-55, 75-76; see also note 2, *supra*).

free to impose over the licensee's objection whatever conditions are in the public interest, no matter how substantial the changes (see pages 8-11, *supra*).

b. Although the petition does not present the question, the Commission appears to take issue (FERC Br. 18-19) with the court of appeals' ruling that it must address fish-protection issues prior to granting a license. Because the question is not presented by petitioner, it is not before the Court (Sup. Ct. R. 21.1(a)). But even if the petition is interpreted to raise this issue,[11] review is unwarranted, for the decision is correct and there is no conflict.

The Commission has pointed to no authority supporting its position that it may completely defer consideration of fishery issues until after it has granted a license. This Court and the courts of appeals have consistently concluded otherwise. See *Udall* v. *FPC*, 387 U.S. at 440; *Friends of the River* v. *FERC*, 720 F.2d 93, 98 (D.C. Cir. 1983); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 624 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).[12] The

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[11]Petitioner argues (Pet. 15) that the court's statement concerning the Commission's discretion to impose new conditions pursuant to re-opener clauses is "the linchpin" of its holding that the Commission must give pre-licensing consideration to fishery issues. A straightforward reading of the court's opinion (Pet. App. 8a-15a) demonstrates that this is simply not true. The court relied first and foremost on the provisions of the Federal Power Act itself and then on a number of other reasons, including the Commission's ability to preserve the status quo pending the mid-Columbia proceeding by issuing annual licenses and the reduced incentives for addressing fishery issues once petitioner has its long-term license in hand.

[12]*Swinomish Tribal Community* v. *FERC*, 627 F.2d 499 (D.C. Cir. 1980), is inapposite. There, the court permitted the Commission to defer consideration of minimum flows where the issue had not been timely raised, the Commission had already given extensive consideration to environmental issues and had prepared an EIS, and the issue could be resolved in an upcoming relicensing proceeding (such as the one at issue here) rather than through an amendment to the license, which was at

court of appeals' decision does not interfere with the Commission's discretion to structure its own proceedings within statutory limits; nor does it prevent the Commission from engaging in a systematic study of fish-protection issues at all of the Mid-Columbia dams (if the Commission does in fact undertake such a study). All that the court requires is that inquiry into these issues as they relate to Rock Island be made before relicensing that project. The Commission may grant annual licenses to preserve the status quo pending such a proceeding, or it may develop a record on Rock Island alone and rely on the reopener clause to make modifications in light of conclusions made when, if ever, the Mid-Columbia proceeding is completed. The one tack that the Commission may not take is the one that it adopted here — relicensing the project for a substantial period of time without prior exploration of all issues relating to the public interest, including preservation of anadromous fish.[13]

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issue there. Here, by contrast, the questions have been raised in a timely fashion and the Commission has given no consideration to fish-protection issues in the licensing proceeding itself.

[13]The Commission's suggestion (FERC Br. 18-19) that it issued the new license to petitioner on the basis of the "best information then available" lacks foundation in the record. The interim mid-Columbia settlement (see page 6, *supra*) did not provide information on fishery issues; it simply established a study program to obtain such data. Nothing in the record of the Rock Island relicensing proceeding, which is wholly separate from the Mid-Columbia proceeding, indicates any consideration of fish-protection issues. The Commission nowhere addressed the fish-protection questions raised by the fishery agencies, nor did the Commission ever require petitioner to submit its Exhibit S on fish and wildlife impacts. Little wonder then that the court of appeals concluded (Pet. App. 10a) that "[i]t is undisputed that in this proceeding the FERC did not undertake [its obligation to consider fish impacts and mitigative measures] prior to issuing the license."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-1365

In The

Supreme Court of the United States

October Term, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE YAKIMA INDIAN NATION, NATIONAL WILDLIFE FEDERATION, AND STATE OF WASHINGTON DEPARTMENTS OF FISHERIES AND GAME IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals decision bars the use of "reopener clauses" in hydropower licenses that provide the Federal Energy Regulatory Commission post-licensing authority to impose reasonable modifications of hydropower projects' structures or operations.

2. Whether the Federal Energy Regulatory Commission was required by the National Environmental Policy Act to prepare an environmental impact statement in connection with its grant of a new 40-year hydropower license for an existing dam, where it was undisputed that the dam significantly affects the human environment and where relicensing provisions of the Federal Power Act require a de novo evaluation of the project's harms and benefits and a review of alternatives to unaltered project operation before issuance of a new license.

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STATEMENT

A. Background Of The Case And The License Decision.

Rock Island Dam, licensed by the Federal Power Commission[1] in 1930, was the first major hydroelectric project constructed on the Columbia River. Located near the town of Wenatchee, Washington, the dam sits athwart a major migration route for spring and summer chinook salmon, coho and sockeye salmon, and steelhead trout. Above the dam are major tributaries, providing natural sprawning and rearing for those species of anadromous fish, as well as three federal fish hatcheries. Upper Columbia populations of salmon and steelhead have historically supported commercial, recreational and tribal fisheries.

Anadromous fish hatch in fresh water, migrate downstream to the ocean and then return eventually to their natal stream to spawn and die. As a consequence, fish from the upper reaches of the Columbia River must pass the Rock Island Dam — and six to eight other hydroelectric projects — twice, once as juveniles and again as returning adults. On each trip, the fish suffer significant injury and mortality at the dams. In the fifty-five years since Rock Island received its original license, the massive hydroelectric development of the Columbia River system has severely depleted the fisheries of the Columbia River.

Rock Island Dam has fish ladders and related facilities which, although not perfect, assist adult fish in their voyage upstream. Since 1930, however, there have been no

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[1]The duties of the FPC were assumed by the Federal Energy Regulatory Commission (FERC) in 1978. 42 U.S.C. § 7172.

comparable passage facilities to assist juvenile fish past the dam on their downstream migration. Under such circumstances juvenile fish must either pass in water spilled over the top of the dam or travel through the power turbines where sizeable numbers are killed.

In 1973, Public Utility District No. 1 of Chelan County, ("Chelan"), which operates Rock Island, applied for a major license amendment for the dam to increase its power production substantially by adding a second powerhouse to the project. Such an increase would necessarily and has, in fact, resulted in much greater proportions of the river's flow passing through turbines and a much smaller percentage being spilled as a matter of course. At the time of the application, fisheries agencies requested that a structural bypass system to permit juvenile migrant fish to pass the dam without going through the turbines be incorporated into the design of the project. The Federal Energy Regulatory Commission ("FERC" or "Commission") denied those requests. Instead of incorporating fish passage facilities at the new second powerhouse, it permitted the construction of the project while deferring protection measures until further studies were completed. *See, Public Utility District No. 1 of Chelan County*, Order Amending License (March 29, 1974), 51 F.P.C. 1141, Pet. App. 80a. The Commission prepared an environmental impact statement in 1974 on the construction of the second powerhouse which, however, did not consider the impacts of the older first powerhouse. Moreover, since the agency deferred the major questions of downstream fish passage for further study, the EIS did not incorporate any serious review of alternative fish passage or fish protection mea-

sures. Nor did the 1974 license amendment include any requirement for spills for downstream fish passage.[2]

In January 1977, in anticipation of its original license expiring in 1980, Chelan filed an application for new major license for the entire Rock Island Dam, both the old "first" and new "second" powerhouses. In their intervention papers and comments, fisheries agencies asked for the implementation of a number of measures to better protect juvenile fish at the dam. There was no hearing on those requests or on Chelan's application. There was no consultation, other than a formal request for comments, between FERC and the fish agencies and tribes on Chelan's application.

In May 1981, the Director of the Office of Electric Power Regulation, using authority delegated to him by the Commission, issued a new major 40-year license for the Rock Island Dam. The new license did not incorporate any downstream fish protection terms, including terms of the

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[2]Chelan's suggestions that the second powerhouse at Rock Island Dam has downstream migration fish protection measures is misleading, if not worse. Its statement that the kind of "bulb" turbines at the second powerhouse kill far fewer fish than traditional "kaplan" turbines, is disputed by experts in the fisheries agencies. The uncontradicted affidavit of a federal fish biologist in the record before FERC suggests that mortality could range from 10 to 30 percent of fish passing through the turbines. J. App. 269-70. Chelan's reference to a structural fish bypass system is similarly inaccurate. Chelan well knows that the so-called bypass system refers simply to a conduit from the gatewell on the upstream side of the dam to a pipe outlet at the downstream side. There is no facility to guide or collect fish. The conduit serves only to salvage fish which have become trapped in the gatewell and is not considered a fish bypass system by the experts.

so-called Mid-Columbia settlement, discussed *infra*.[3] There were no spills required in the new license. There were no specific stream flows required in the new license. There were no downstream fish bypass facilities required in the new license.[4] The new license merely included standard clauses reserving the Commission's authority (but not the duty) to prescribe flow releases, Article 12, Pet. App. 48(a), and to require "reasonable modifications of the pro-

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[3]See, Order Issuing New License, Pet. App. 23a-58a. FERC's statement to the contrary, FERC Brief at 4, is flatly wrong. It made the same false claim to the Ninth Circuit, which itself erred in assuming that at least the minimum flow provisions of the Mid-Columbia agreement were incorporated into the new license. Pet. App. 13a. A review of the license shows that not to be the case. In any case, the settlement expired in March 1984, but the license lasts until 2020.

[4]The Director did make certain minor changes in the license on nonfish issues. For instance, the Director added or amended Articles 3, 5 and 44, which give the utility authority to convey certain project lands. Article 44 adds detail, but little of substance, to previous licenses. Article 29 of the original Rock Island license required that the licensee retain ownership of the project area. Original Article 31 permitted the Commission to alter the license with the licensee's consent. Presumably, if the utility wished to dispose of part of the project area, it would give its "consent" and the sale could be arranged with a change in the license. New Article 39 deals with archeological and historic sites. That Article does two startlingly unimportant things. First, it enjoins Chelan to "continue [its activities] . . . as required by the prior license." J.A. 118. Second, it requires archeological work "prior to the commencement of any construction or development." But since, as Chelan and FERC note, the license anticipates no new construction, the Article is simply irrelevant. FERC and Chelan make much of these changes, suggesting their expeditious implementation helped justify licensing without fish protection measures. Even if that were legal, however, the new articles add little or nothing of substance, as compared to the important fish issues left unresolved. FERC's purported concern for non-fish values at Rock Island is commendable, but trivial.

ject structures and operation . . . after the notice and opportunity for hearing'' for the conservation and development of fish and wildlife resources. Article 15, Pet. App. 50(a). Article 38 of the new license reiterated the 1974 license amendment in calling for additional studies of fish and wildlife needs, but extended the deadline of the crucial Exhibit S (a fish and wildlife plan required by regulation to be filed *at the time of application*, 18 C.F.R. § 4.41 (1976)), until May 1984. Pet. App. 34(a). The Director explained his failure to impose any conditions to improve the passage of downstream migrating fish at Rock Island by saying that the needs of fisheries were being studied in the separate license modification proceeding dealing with five Columbia River dams, including Rock Island — the so-called Mid-Columbia proceeding. *See*, discussion, *infra*.

No EIS accompanied the issuance of the new major license for Rock Island Dam. The Director justified the failure to prepare an EIS on the grounds that the new license did not change existing project operations.

The National Marine Fisheries Service and the Yakima Indian Nation, joined by the National Wildlife Federation, appealed the Director's decision to the full Commission. In those appeals, and in subsequent requests for rehearing, the agencies and tribes requested specific fish protection measures and asked that a full evidentiary hearing be called if necessary to enable them to define the details of those measures. Also attached to the petition for rehearing were uncontested affidavits from biologists working for the National Marine Fisheries Service showing that significant fish mortalities continued at the Rock Island Dam. The biologists also explained that license conditions to protect fish could be established with then available

data. The Commission rejected the appeals and the subsequent requests for rehearing, relying on the existence of the so-called Mid-Columbia proceeding to "address the concerns" of the fish agencies. It expressed a desire to wait for a full record to be certified to it from the Mid-Columbia proceeding, but ignored the record made in the relicensing proceeding itself by the agencies documenting the problem and suggesting solutions. It also ignored the fish interests' willingness and desire to go to hearing on the relicense order to supplement that record if the Commission felt it necessary. FERC reiterated and made more clear the Director's justification for failure to prepare an EIS when it said that since the new license did not change the status quo (that is, the dam still existed and continued to operate in essentially the same manner), no EIS was required.[5]

B. The Mid-Columbia Proceeding.

Rock Island Dam is one of five non-federal projects in that part of the Columbia basin known as the Mid-

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[5]The Commission argues for the first time in its brief before this Court that it did consider the fishery issues at Rock Island in light of the "best available data," at the time—the Mid-Columbia settlement. FERC Brief at 18-19. The record of the decision to issue the license shows exactly the contrary, and for that reason the Ninth Circuit found it "undisputed" that FERC did not study fishery impacts and mitigation alternatives at the project. Pet. App. 10a. The settlement, of course, is not data, but rather a temporary compromise that called for "studies" to gather data. And, even if its terms were the best proposals then available, FERC did not incorporate the settlement into the license and the agreement has since lapsed. Moreover, the Commission ignored the uncontradicted affidavits of agency fish biologists announcing that there was information available on which substantive fish protection measures could be based without further study.

Columbia.[6] In 1976, the Washington Departments of Fisheries and Game moved FERC to improve flows for fish at one of those projects, the Priest Rapids Dam. In 1978, Washington joined with other state and federal fisheries agencies and the Yakima Indian Nation asking for license modifications for all five dams, including Rock Island, to improve flows and spills for fish passage. The licensees, including Chelan, opposed this request, arguing that the Commission was without authority under "reopener clauses" to modify licenses without licensee consent. Pet. App. 111a, *see,* further discussion of Chelan's response, fn. 11, *infra.*

In March 1979, the Commission consolidated the 1976 and 1978 requests in a single proceeding, the "Mid-Columbia" proceeding. The Commission did not consolidate the Rock Island relicensing proceeding with the Mid-Columbia process. The Mid-Columbia proceeding was, to the contrary, only to consider, under "reasonable modification" clauses in preexisting licenses, "the ways, if any, in which the operations of [the] Projects . . . should be modified . . ." to protect anadromous fish "for the remainder of [existing] license terms." Order Consolidating Proceeding, Pet. App. 110a, 114a, 119a.

In March 1980, the parties to the Mid-Columbia Proceeding signed a settlement calling for a five year study program to investigate the impacts of the projects and means to improve fish passage and production. The agreement also provided some small increases in spill and hatchery production. The settlement was plagued by differences between the parties and in 1981 the fish agencies

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[6]FERC states incorrectly that there are six projects.

moved to set it aside. Since then, although the agreement was not rescinded, project operations have been arranged through annual stipulation. *See*, Administrative Law Judge Report to the Commission on Status of Proceeding (March 17, 1983). The agreement itself expired in March 1984.[7]

At the time the Court of Appeals acted, and still today, there was no schedule for, or hearings set to determine a schedule for long-term resolution of fish issues at Rock Island Dam. There are no further studies planned for Rock Island Dam under the aegis of that proceeding.[8]

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[7]FERC asserts that there are currently hearings being conducted to determine fish protection measures at the Mid-Columbia Dams and that the parties have agreed on measures for improved fish protection. FERC Brief at Note 1. In fact, the only hearings scheduled—and, contrary to FERC's statements, these are the first formal hearings ever held in the Mid-Columbia proceeding—are to address the limited question of how to operate Rock Island Dam in 1986 and 1987.

In 1984, Chelan PUD and the other parties to the proceeding could not reach agreement on how to operate Rock Island Dam in 1985, on or what, if any, studies should proceed at that project. (Chelan opposed all additional studies of bypass systems and levels of spill effectiveness.) The Administrative Law Judge set the 1985 spill at Rock Island at the level proposed by Chelan and considered inadequate by the fishery interests. He also established a schedule for hearings on what interim fish protection measures should be taken at Rock Island Dam—for 1986-1987 only. Order Directing Flow Regime, Establishing Further Procedures, and Phasing Case (November 21, 1984). The Judge refused agency requests to clarify how the relicensing issues at Rock Island Dam related to the 1985 hearing on the grounds that he was without jurisdiction on relicensing matters because the Commission had not consolidated them with the Mid-Columbia Proceeding. Order on Motion for Clarification (December 6, 1984).

[8]There is no basis, therefore, for FERC's description of the Mid-Columbia proceeding, especially as relates to Rock Island Dam, as an "ongoing comprehensive study of all fishery-related issues," FERC Brief at i, or as a "projected 10-year study." FERC Brief at 19.

C. The Court Of Appeals Decision.

The Court of Appeals found that in granting a new license to Rock Island Dam prior to considering and resolving controverted fish protection issues FERC violated a number of its statutory and regulatory obligations. The court determined that in relicensing hydropower projects under Section 15 of the Federal Power Act (FPA), 16 U.S.C. § 808, the Commission must conduct the same careful assessment of impacts and alternatives as for an original license under Section 10 of that law. 16 U.S.C. § 803. The court found, in addition, that the obligations imposed by Section 10 were "well defined." "FERC must consider fishery issues *before,* not after, issuance of a license." Pet. App. 10a. Since it was "undisputed" that FERC had not conducted a careful review of fish issues, but had, instead, deferred all such questions to some future analysis in the Mid-Columbia proceeding, the court concluded that FERC had violated the FPA.

The court also found that the deferral of fish issues violated the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (requiring that fish and wildlife be given "equal consideration" to power production) and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839b(h)(11)(A) (requiring that fish and wildlife receive "equitable treatment" with power production). Pet. App. 14a-15a.[9] In addition, the court deter-

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[9]FERC suggests that a reversal of the court of appeals on the FPA issue would automatically invalidate the holding based on these two statutes as well. That is clearly not the case. As the Court of Appeals noted, the Coordination Act and Northwest Power Act "place additional mandates on the Commission in a relicensing proceeding." Pet. App. 14a. Thus, even if the Commission's action in deferring fish issues was legal under the FPA, it is still proscribed under these additional statutes.

mined that FERC violated its own rules 18 C.F.R. § 4.41 (1976), when it failed to require Chelan to submit an Exhibit S (a fish and wildlife report) *prior* to licensing. Pet. App. 15a-18a.

Finally, the court declared that FERC violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, when it issued a new license without preparation of an EIS. It rejected the argument that the relicense was no "more than a phase in continuous activity." Pet. App. 20a. Instead, it noted that in a relicense proceeding the Commission is obligated under the FPA to fully canvas the impacts of, and alternatives to, continued operation of a project under previous license conditions. Since "relicensing . . . is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo," Pet. App. 21a, and since no one disputed that the Rock Island Dam significantly affects the quality of the human environment, Pet. App. 18a-19a, the court of appeals found an EIS should have been prepared *before* the license was issued.

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ARGUMENT

This Court grants review on writ of certiorari "only when there are special and important reasons." Sup. Ct. R. 17. This case does not present circumstances justifying a writ. There is no conflict between the Ninth Circuit's holding and that of other Circuits. Nor do the questions of federal law decided by the Ninth Circuit require review by this Court.

I. The Court Properly Interpreted The Federal Power Act.

A. Chelan And FERC Misconstrue What The Court Of Appeals Held And Improperly Seek Review Of An Issue Not Decided Below.

FERC is authorized by § 10 of the Federal Power Act (FPA) to issue licenses to hydropower projects on or affecting navigable waters of the United States. 16 U.S.C. § 803(a). Such licenses may only be issued after a full public interest review and after FERC canvasses all reasonable project alternatives and their environmental impacts. *Udall v. FPC,* 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference v. FPC,* 354 U.S. 941, (2d Cir. 1965), *cert. denied,* 384 F.2d 941 (1966). A decision to relicense a project, that is, to issue a new major license under Section 15 of the FPA, 16 U.S.C. § 808, requires a similar review. As the court of appeals said, in issuing a relicense FERC must "reevaluate the best use of . . . [the] project . . . in light of contemporary and prospective public needs," Pet. App. 21a, quoting H.R. Rep. No. 1643, 90th Cong., 2d Sess., reprinted ir 1968 U.S. Code Cong. & Ad. News, 3081, 3086, and in the same manner and care as it would an initial license. *Id.* at 3084.[10]

In issuing the Rock Island license, FERC deferred major and critical fish protection issues indefinitely, claiming that they would be resolved after additional study in the so-called "Mid-Columbia" proceeding. It con-

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[10]FERC did not dispute the similarity of initial and relicense proceedings before the Ninth Circuit. It now hints there may be a difference, FERC Brief at n. 8, but provides no reason to question the court of appeals on this point.

cluded that it could substitute the future right, after the license was issued, to require "reasonable modifications of the project structures and operation . . . after notice and opportunity for hearing," New Major License, Article 15, Pet. App. 50a, for the broad discretion to act in the public interest it enjoys under § 10 and § 15 of the FPA, 16 U.S.C. 803, 808, prior to issuance of the license. The court of appeals held that the Commission could not meet its § 10 and § 15 obligations after the fact. It said: "The law, then, is well defined: Prior to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures." Pet. App. 10a. "FERC must consider fishery issues *before* not after issuance of licenses." *Id.*

Both FERC and Chelan misconstrue what the court of appeals did and urge that this Court grant certiorari to review and reverse a conclusion the court of appeals never reached. According to FERC and Chelan, the court of appeals has read § 6 of the FPA, 16 U.S.C. § 799, to prohibit FERC from using so-called "reopener clauses" in licenses to permit future alterations in project works or operations. They then spend the bulk of their briefs disputing the propriety of that conclusion.[11]

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[11]Chelan's argument on this point is particularly ironic. When the agencies and tribes sought to alter Chelan's existing license in their petitions commencing the Mid-Columbia proceeding, Chelan argued that the "reasonable modification" language of a reopener clause significantly curtails FERC's discretion. It claimed, first, that *no* new conditions could be imposed without its consent. Answer of Chelan PUD to Motion and Petition for Modification of Project Operations. J.A. 52, 54. It also asserted that the word "reasonable" in the phrase "reasonable modifications," meant only to "elicit . . . Chelan's

(Continued on following page)

The court of appeals did not bar the use of reopener clauses. It specifically recognized and approved them. Nor was its opinion based primarily on the scope of § 6 of the FPA. The court held, rather, that under § 15 and § 10 of the FPA, FERC may not use a reopener clause to substitute for pre-license consideration of fishery issues.[12] Pet. App. 13a. The court's discussion of § 6 was subdsidiary to its main holding. Thus, the court of appeals' opinion in this case is not in conflict with any court ruling permitting the use of reopener clauses. E.g., *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983); *California v. FPC*, 345 F.2d 917 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965). Most of what Chelan and FERC have

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cooperation," not provide blanket authority to override previously decided conditions. Application of Chelan PUD for Rehearing of Order Consolidating Proceedings, J.A. 71, 74. Finally, Chelan stressed repeatedly that § 10(a) of the Federal Power Act required the Commission to modify projects *before* they were licensed. After license approval, the board authority of § 10(a) was, Chelan said, lost. J.A. 55, 75-76. Chelan argued that, notwithstanding the reopener clause, the Commission by issuing a license had made a finding that the project, as licensed, met the public interest test of § 10(a). In any effort to reopen the license, therefore, the burden would lie with petitioners and Chelan would demand a comprehensive review of all issues implicated by the proposals through development of an EIS. J.A. 56, 76.

[12]Chelan's and FERC's misconstruction of what the court did is clearly revealed in their statements of the issue they seek to raise before this Court. Each asks whether § 6 of the FPA bars the use of reopener clauses. The court of appeals, however, held that §§ 10 and 15 required prelicensing consideration of fish issues. Moreover, it did not deny, indeed it affirmed that § 6 did not prohibit the use of reopener clauses. It merely pointed out that the right to impose license modification under a § 6 reopener, such as that found in the Rock Island license, cannot substitute for a complete prelicense review.

to say in their briefs, while it may be relevant to theoretical questions about the reach of § 6 of the FPA, nevertheless has no bearing on what the court of appeals actually did. The Court should not grant a writ to review issues never decided by the Ninth Circuit.

B. The Court of Appeals Properly Found That The Federal Power Act Requires Pre-License Review And Resolution Of Fishery Issues.

As we have explained, the FPA issues posed by Chelan and FERC in their papers (whether § 6 of the law prohibits the use of "reopener clauses" in hydropower licenses) was neither reached nor decided by the Ninth Circuit in a manner contrary to the current petitioners' position. Insofar as FERC and Chelan criticize what the court of appeals actually held, they do so primarily by indirection. But neither give any convincing basis to dispute the court's fundamental legal conclusion nor any reason why this Court should go beyond the issues actually presented by the petition for a writ and review the Ninth Circuit's decision.

Chelan suggests that the court of appeals' holding "is not supported by . . . the case authority or legislative history which it cites." Chelan Brief at 16. That bald assertion does nothing to undermine the solid analysis contained in the court of appeals' opinion, which analysis we will not repeat here. It is worth noting, however, that all the cases on § 10 of the FPA support what the Ninth Circuit did here. For instance, this Court has itself said that a license decision "can be made *only after* exploration of all issues relevant to the 'public interest' . . . ." *Udall v. FPC*, *supra*, 387 U.S. at 450 (1967) (emphasis added).

Moreover, in a companion case to one relied upon by Chelan and FERC *(Pacific Gas and Electric Co., supra)* the court of appeals for the District of Columbia Circuit interpreted the FPA and *Udall* as did the Ninth Circuit:

> [T]he Court [in Udall] . . . conveyed this message: where a project may have major adverse environmental effects, the Commission should carefully consider the need for the project, in light of its multiple impacts on commerce recreation, wilderness, and wildlife preservation, *before granting a license.*

Friends of the River v. FERC, 720 F.2d 93, 102 (D.C. Cir. 1983) (emphasis added).

The Second Circuit followed a similar approach in a case closely analogous to this one. In *Scenic Hudson Preservation Conference v. FPA, supra,* the Commission had rejected intervenors' objection to its grant of a license "while at the same time deferring . . . [its] final decision on the design of fish protection facilities." *Consolidated Edison Company of New York,* Project No. 2338, 33 FPC 965, 968 (1965). The intervenors argued, as here, that the Commission had thus "fragmentized the project and proceeded without weighing all the factors required by Section 10(a) of the Federal Power Act." *Id.* The court remanded for the Commission's failure to compile a record sufficient to support its decision, to consider all relevant factors, and to study all reasonable alternatives. It specifically found the analysis of fishery issues inadequate and said:

> [I]t is [the courts'] . . . duty to see to it that the Commission's decisions receive that careful consideration which [Section 10(a) of] the statute contemplates. [354 F.2d at 612] At the time of its original hearings, there was sufficient evidence before the Commission

> concerning the danger to fish to warrant further inquiry. [*Id.* at 623] On remand, the Commission should take the whole fisheries question into consideration *before deciding whether the Storm King project should be licensed.* [*Id.* at 624] (emphasis added).[13]

FERC and Chelan also invoke this Court's cases admonishing courts "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 525 (1978). The court of appeals understood the teachings of those cases, however, Pet. App. 10a-11a and nothing it held conflicts with this Court's holdings. *Vermont Yankee* is no "talisman under which any agency decision is by definition unimpeachable." *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance* — U.S. —, 103 S.Ct. 2856, 2870 (1983). Rather, FERC's discretion to structure its procedures is circumscribed by its statutory duty to understand a proposed project, its impacts, and its alternatives, before it issues a license. Otherwise, it cannot comply with its substantive public interest obligations under the FPA. *Udall v. FPC*,

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[13]In short, Chelan's effort to diminish the significance of the *Scenic Hudson* decision as based solely on an evidentiary question is wide of the mark. The Ninth Circuit ruling, moreover, does not conflict in any way with the D.C. Circuit's *Swinomish Tribal Community v. FERC*, 627 F.2d 499 (D.C. Cir. 1980). There, the court of appeals permitted the Commission to conduct a separate proceeding on instream flow issues, rather than reopen a hearing already long closed. The petitioners, among other things, had failed to exhaust their administrative remedies by asking for consideration of flow issues in a request for rehearing on the license. Moreover, the request to reopen the license proceeding, which led the Commission, instead, to institute the separate flow hearing, came several years after the record was closed.

supra. The court of appeals did not impose "additional procedural requirements on [the] . . . agency" not required by statute, *Id.*, such as the special hybrid rule-making imposed by the court of appeals in *Vermont Yankee*. It simply required that FERC not commit the public water resources of the Columbia River for forty years prior to conducting any hearing, under any procedures, to assess and resolve controverted fish protection issues.

FERC also endeavors to make policy and factual arguments unconnected to the case at hand. The Commission suggests, for instance, that the reopener condition here should be an acceptable substitute to full pre-license review because "the Commission did consider the fish issues by basing its 1981 conditions on the best information then available." FERC Brief at 19. That statement can find no support in the record. The Commission did not seek to compile the best information available; indeed, it rejected requests by the fishery interests to hold a hearing for that purpose. Insofar as there is a record, it consists of undisputed fish agency affidavits proposing fish protection measures. But the Commission, even with those affidavits before it, refused to consider the fish issues at all, and deferred them totally into the future under the Mid-Columbia proceeding. Pet. App. 10a. *See*, discussion, fn 5, *supra*. On the critical questions of flows, spills, and and juvenile fish passage, there are *no* "1981 conditions." The license nowhere incorporates even the minimal provisions of the now expired Mid-Columbia settlement. *See*, fn. 3, *supra*. FERC had before it "sufficient evidence . . . concerning the danger to fish to warrant further inquiry," *Scenic Hudson*, 354 F.2d 612, and the Commission so ad-

mits. Yet, it granted a license without any such inquiry. That is the legal violation here.

FERC also urges that the court of appeals opinion will hamper its administration of the FPA. It suggests that in certain circumstances when licensing *new* projects it may only be able to impose appropriate license conditions after studying the actual operation of a project, after it is licensed and built. FERC Brief at 20. Such circumstances are not before the Court. Here, even if further study of the Rock Island Project were required to make an adequate record to impose fish conditions (a position the fisheries interests disputed in their affidavits), the Commission had a simple choice. It need not have issued a new license; it could have studied the project's operation under annual licenses, and then based its licensing decision on the results of those studies.

Moreover, the assertion that the Commission will face a Hobson's Choice between "impos[ing] conditions based on theoretical guesswork without the best available data . . . or not issu[ing] a license at all," FERC at 20, has no applicability to the Rock Island case. The Commission could have delayed issuing a new forty-year license to the project pending a hearing, and power production would have continued. Moreover, the fish agencies believed — and so stated in their uncontradicted affidavits—that information was available to support reasonable fish measures as license conditions. The Commission refused even to hold a hearing to investigate the information the agencies offered. Finally, the Commission's assertions that it needs to build projects in order to study them, while irrelevant to this case both on legal as well as factual grounds, is also of dubious value as a matter of policy. Post-license

monitoring to fine-tune fish protection measures is always wise. But it is difficult to credit the assertion that, with the sophistication of scientific analysis now available, the Commission cannot, after a full hearing, develop conditions for any license issued that impose basic fish protection measures and responsibilities.

While reopener clauses are undoubtedly useful license provisions, the court of appeals was not incorrect in finding, at least in the form granted to Chelan, that such provisions cannot be expected, either legally or practically, to substitute for thorough prelicense review and license conditions. At the licensing stage, the Commission has very wide authority to "require the modification of any project and of the [project] plans and specifications. . . ." 16 U.S.C. § 803(a). Under a reopener clause, the Commission can only require "reasonable modifications of the project structures and operation . . . ." Pet. App. 50a. Moreover, at licensing, the applicant bears the burden of demonstrating that its project can pass the public interest standards of the FPA, and other relevant statutes, including fish and wildlife protection. 5 U.S.C. § 556(d). After licensing, the burden shifts to the Commission (or others) if they want to change the license. At licensing, the Commission can at least consider a nonpower or partial nonpower license where fish protection should be paramount. 16 U.S.C. § 808. Once a power license is issued, that option disappears.

Far from being necessary or advantageous, the Commission's process of permitting the construction of dams and studying their impacts later is likely, instead, to have very serious adverse practical consequences. First, as the court of appeals noted, such an approach gives the licensee

no incentive to act swiftly to install fish facilities. It creates a very real incentive to delay additional, perhaps costly, structures indefinitely. Second, a license order creates a new "status quo" against which fish protection measures are to be judged. What may be a straightforward construction task before major structures are in place could prove more difficult and costly if undertaken later and if not designed into the major structure to begin with.[14] A license without fish conditions may well foreclose reasonable options, not only construction options for a particular project, but radically different alternatives such as different location or placement of a project or the denial outright of a project license. While FERC may assume that fish protection can be achieved after study, it could turn out that a project is simply incompatible with a healthy fishery. If that were true, it would only be discovered, under the Commission's power first/fish last approach, after concrete has been poured and it is too late to prevent the damage. Indeed, it is this very approach — building dams and studying fish later — that has brought some of the once magnificant salmon runs on the Columbia River near to the point of extinction.[15]

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[14]This is exactly why the fish agencies requested the integration of fish passage facilities at the design stage of the Rock Island second powerhouse in 1974. Since FERC refused that request then, it is proving more difficult to fit fish passage onto a dam not designed for it.

[15]The power first/fish last history of the Columbia River led directly to the passage of the fish and wildlife protections contained in the Pacific Northwest Electric Power Planning and Conservation Act. 16 U.S.C. §§ 839 et seq. According to the General Accounting Office in a report commissioned by the

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In sum, this Court need not grant certiorari to review theoretical questions not decided by the Ninth Circuit. Nor should it accept this case to consider the court of appeals' well-founded conclusions about the meaning of the FPA, conclusions that are not, in any case, challenged by the petitioners.

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House Commerce Committee, "while several factors have contributed to the decline of the [Columbia River] fish runs, a major problem is failure to adequately mitigate the adverse effects of dams constructed and operated by federal agencies and electric utilities." Testimony of Douglas L. McCullough, Hearings before Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978) at 177-178 (hereinafter Northwest Power Act Hearings). That failure had many causes. Among other things, fish and wildlife needs often were neither fully assessed nor measures to meet them implemented prior to the commencement of power operations. Instead, power operations were begun with no more than promises to study the needs of fish and wildlife in the future and recommend necessary measures. Such recommendations often were not made or, if made, not implemented. Northwest Power Act Hearings at 840.

The problem was put in terms of a remedy by Mr. Kenneth Higgs, of the U.S. Fish and Wildlife Service. He recommended that one of the critical factors in protecting and enhancing fish and wildlife in the Columbia River was to "assure that adequate fish and wildlife planning and operations go forth *at the same time* as power construction." Hearings at 840. (emphasis supplied) The Corps of Engineers had regularly made glowing promises about its determination to study the needs of fisheries and incorporate the best possible fish protection measures on its dams *after* they were constructed. *See*, Blum, "Hydropower v. Salmon: The Struggle of the Pacific Northwest Anadromous Fish Resources for Peaceful Coexistence with the Federal Columbia River Power System," 11 Envtl. L. 212, 236-237 (1981). Projects licensed by the Commission also regularly contained "reopener" clauses requiring the implementation of additional fish protection measures as they were developed. The condition of the salmon resources, however, vividly demonstrates that the performance of these promises "must be judged an abject failure." *Id.* The regulatory history of the Rock Island Dam tracks directly this pattern of power first/fish last.

II. The Court Of Appeals Correctly Found That The National Environmental Policy Act (NEPA) Requires Preparation Of An Environmental Impact Statement Prior To Relicense Of A Hydropower Project That Significantly Affects The Quality Of The Human Environment.

The relicense of a hydropower project, that is, the grant of a new license, commits a public resource — a navigable stream — to a particular use for up to fifty years. As when making any initial license decision, the Commission must take a fresh, comprehensive look at the proposed project and its operation, must study its impacts, and conconsider possible alternatives to the operation proposed by the applicant. 16 U.S.C. § 808, *Udall v. FPC*, 387 U.S. 428 (1967), *Scenic Hudson, supra. See,* discussion, *supra.* Such a review is exactly the sort of analysis for which the environmental impact statement (EIS) process of NEPA is designed.

Congress directed that NEPA's policies, including the EIS requirement, should be implemented "to the fullest extent possible." 42 U.S.C. § 4332(1). An agency must comply with NEPA unless some "existing law applicable to such agency's operations expressly prohibits or makes full compliance . . . impossible . . . ." 115 Cong. Rec. 39703 (1969) (statement of House Conferees), quoted in *Flint Ridge Development Co. v. Scenic Rivers Association,* 426 U.S. 776, 787-788 (1976). Here, the two statutory schemes — the FPA and NEPA — mesh perfectly. The FPA requires a comprehensive look before granting a relicense. NEPA sets out a mechanism to help accomplish such a review. Given that fit, the court of appeals properly concluded that prior to committing the public water resources of the Columbia River to hydropower production at the Rock Island Dam for an additional forty years, the Commission should have prepared an EIS.

Chelan and FERC would have this Court overturn the Ninth Circuit determination that an EIS is required because relicensing Rock Island Dam merely continues the "status quo." Crudely put: the dam has long killed fish and otherwise significantly altered the natural attributes of the Columbia River. Since it will continue to kill fish and significantly alter the Columbia River under the new license, Chelan and FERC say that no EIS is necessary. They argue this even though under possible alternative operations that should have been reviewed by FERC as part of its FPA licensing process, the dam's impact could have been made lesser than the status quo.[16]

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[16]FERC makes the wholly unsupported argument that the court of appeals imposes an "automatic [EIS] rule" for all relicensing decisions. That simply misreads the court of appeals' opinion. The court of appeals' opinion required an EIS when a project that "significantly affects the environment" seeks a new license. Pet. App. 18a-19a. The court of appeals opinion obviously did not repeal, indeed it relied upon, NEPA's language that requires an EIS only if the project "significantly affects the quality of the human environment." 42 U.S.C. § 4332 (2) (c).

Both the Commission and Chelan also urge this Court to overrule the Ninth Circuit because preparing EIS's would impose a "staggering burden" on the Commission. This Court, of course, will not rewrite statutory directives simply because an agency complains of the difficulty of complying with the law. Cf, *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978). In any case, since FERC is obligated even under the FPA to perform an analysis similar to that required by NEPA, *Scenic Hudson Preservation Conference, supra,* incorporating the NEPA procedures should impose no great additional work. Of course, for the Rock Island relicensing, the Commission did not perform the required analysis of impacts and alternatives pursuant to the FPA, let alone that directed by NEPA.

FERC's further assertion that preparing EIS's in order carefully to assess the consequences of its actions would have no "correlative benefit to the environment," FERC Brief at 9, represents an arrogant denial by the Commission of the fundamental Congressional goal in passing NEPA—to improve environmental protection by improving environmental analysis. It is thus unworthy of serious response.

To further their argument, Chelan and FERC cite cases from the Ninth Circuit and other courts that have permitted actions to proceed without an EIS when the environmental status quo remained unchanged. There is no conflict, however, between those cases and the court of appeals' ruling here. None of these cases involved dam relicensing and none, more importantly, involved a situation where, as here, the government agency involved had an independent statutory duty fully to reevaluate the wisdom of a pre-NEPA project and analyze a complete range of alternatives to its continued "status quo" operation. In *San Francisco Tomorrow v. Romney,* 472 F.2d 1021, 1024 (9th Cir. 1973), for instance, the court reviewed an action that had commenced prior to passage of NEPA. It concluded that the critical agency decisions were all "pre-NEPA" determinations and were not, therefore, subject to further review pursuant to that statute. The steps specifically challenged were considered mere implementation of the previous decision. In this case, by contrast, the major federal action occurred in 1982, long after NEPA's passage. The issuance of the new license in that year did not constitute the continuing implementation of a decision to license Rock Island Dam in 1930. It was, instead, an entirely new decision on whether, and how, the dam would operate for 40 more years.

In *Sierra Club v. Hassell,* 636 F.2d 1095 (5th Cir. 1981), the court did not require an EIS for reconstruction of a bridge destroyed by storms. But, in that case, too, there was no separate requirement that the Federal Highway Administration perform a comprehensive reevaluation when replacing the bridge. Here, FERC cannot evade its responsibility to perform a reevaluation of Rock Island Dam under the FPA.

The situation was similar in *San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) (no separate statutory requirement that the Navy fully reconsider the use of a 30 year-old shipyard). In that case, the court of appeals concluded that the lease of the shipyard was "a phase in an essentially continuing activity . . . [and] the Navy [need not conduct itself] as if [it] were establish-[ing] . . . the facility for the first time." *Id.* 615 F.2d at 501. Under the FPA, however, relicensing the Rock Island project cannot be treated as "an essentially continuing activity, "for to do so would violate the obligation to re-evaluate fully the wisdom and conditions of power operations. Relicensing cannot, therefore, be exempted from NEPA review procedures.[17] The court of appeals properly treated this case as significantly different from the so-called "status-quo" cases relied upon by Chelan and FERC. There is, therefore, no conflict among the circuits and no error in the Ninth Circuit's analysis.

FERC and Chelan also criticize the court of appeals for discussing the alternative of a nonpower license to support its call for an EIS. The court discussed that alter-

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[17]Two other cases cited by Chelan are similarly inapposite. *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-117 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). It is also worthy of note that in both *San Francisco, supra*, 615 F.2d at 501 and *Hassell, supra*, 636 F.2d at 1099, the courts were strongly influenced by the fact that, even without preparing an EIS, the agencies gave extensive consideration to environmental factors, and assessed alternatives to the status quo, before proceeding with the projects. FERC's environmental analysis of the Rock Island project, in contrast, consisted of less than one page of unsupported conclusions and no serious review of alternatives.

native, and the federal takeover option which is not directly applicable here because of Chelan's status as a municipality, 16 U.S.C. § 828, merely to illustrate the breadth of review required by the FPA at relicensing. FERC's and Chelan's arguments that the nonpower license represents an unreasonable alternative at Rock Island are, however, simply irrelevant and premature. Once FERC begins "scoping" the Rock Island EIS, 40 C.F.R. § 1501.7, it can be determined whether the nonpower option should be further evaluated. No matter what conclusion may be reached through that administrative process, neither FERC nor Chelan deny, nor can they deny, that the FPA requires consideration of a full range of alternatives to a proposed license, as well as an analysis of those alternatives' environmental impacts. *Udall v. FPC, supra. Scenic Hudson Preservation, supra.* Nor can they deny that NEPA envisions a similar assessment. Whether one of the studied alternatives should be a nonpower license remains to be determined.[18]

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[18]There are a whole series of alternatives for operation of the Rock Island Dam different from its current operations and short of transforming the dam into a nonpower facility. FERC considered none of them. FERC's lengthy argument, however, that a nonpower license is not appropriate in this case and, evidently, in the Commission's view, in any case, is highly disturbing. To discount a Congressional authorization to the Commission to consider nonpower licenses as "nothing more than [of] historic interest" reflects an arrogant disregard of statutory language. And to argue, even before it has had an evidentiary hearing on the issue, or prepared an EIS, that a nonpower license at the Rock Island project is not "a viable alternative," FERC Brief at 14, or that it is "a most extreme and unjustifiable [step]", Chelan Brief at 15, represents a prejudgment of the very sorts of issues that both the FPA and NEPA contemplate will be decided only after careful review.

Finally, FERC suggests that the Ninth Circuit has required it to create in an EIS "frivolous boilerplate" and that contemplating the environmental impact of the continued power production at the Rock Island Dam is merely "an abstract exercise." FERC Brief at 15-16. This argument seems to reflect the Commission's determination that no matter what analysis it performs, it will issue an identical license. But the fact that the Commission foreclosed all other options, and has refused to consider any alternatives to the continued operations of the Rock Island Dam under current license conditions, does not make the court of appeals' direction meaningless. To the contrary, the court of appeals enjoins FERC to do what it did not do, what it evidently still resists doing, and what both the FPA and NEPA require: to look afresh at operations at the Rock Island Dam, consider alternatives to its continued operation under current conditions, and weigh impacts of the range of alternatives it selects. There is nothing frivolous about that exercise, unless FERC undertakes it with a closed mind.

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CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully sbmitted,

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No. 84-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. 84-1365

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION

SUMMARY OF POSITION [1]

As is amply illustrated by FERC's Brief in support of Chelan's Petition and the Brief for the Secretary of Commerce in Opposition, the instant case involves sharp divergences between two major agencies of the federal government regarding their understanding of the requirements of two significant federal statutes—the Federal Power Act and the National Environmental Policy Act (NEPA).

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[1] We have conferred with the Federal Energy Regulatory Commission and it concurs with our submission contained in this summary.

The main underpinning of the court of appeals' decision, as interpreted by the Secretary of Commerce (Secretary) is that "[u]nder the Federal Power Act . . . the Commission must start from a clean slate in deciding whether to relicense a particular project." Commerce Brief at 10; Brief for the Yakima Indian Nation, National Wildlife Federation and State of Washington Departments of Fisheries and Game (hereinafter referred to as "Yakima Brief") at 22. From there, the Secretary reasons that for NEPA purposes, a relicensing "plainly constitutes either a proposal itself or the revision of an ongoing program" requiring an environmental impact statement (EIS). Commerce Brief at 11. At the same time, however, the Secretary asserts that "an EIS will be required only where a particular dam's operations *significantly* affect the environment . . . ," Commerce Brief at 12; emphasis added. These are inconsistent positions which underline the very issue that needs to be resolved by this Court, *i.e.* whether there is an unyielding rule automatically requiring an EIS on every relicensing [2] or whether that question is to be determined on a case-by-case basis.[3]

The resolution of that question depends in large measure on an answer to the broader question of how one views the Commission's relicensing obligations under section 15 of the Federal Power Act, 16 U.S.C. § 808, an

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[2] The Ninth Circuit clearly believed that such a rule should apply. For example, the court stated: "Both the consideration of what conditions to attach to a new license and the questions involved in determining whether a non-power license is necessary necessitate information prepared in an [EIS]". Pet. App. 20-21.

[3] Respondents seem to find a basis for an EIS from the fact that there are fish questions to be resolved. *E.g.*, Commerce Brief at 8-9; Yakima Brief at 24. As pointed out in the Commission Brief in support of the Petition, that is a Federal Power Act issue, and unless the status quo of the project is changed, it does not automatically trigger the application of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). See FERC Brief at 12, n.5.

issue left open by this Court in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 104 S. Ct. 2105, 2114, n.23 (1984). To be sure, *Escondido* dealt in terms of section 4(e) of the Act, 16 U.S.C. § 797(e). It will not do, however, to dismiss *Escondido* as therefore "irrelevant." Commerce Brief at 9, n.6. Rather, the issue left undecided in that case is the issue at the core of this case—the Commission's basic responsibilities on relicensing, as contrasted to its duties in the initial licensing process.[4] It is our submission that those duties significantly differ.

The Secretary further claims that "even if EIS preparation is burdensome for the agency, Congress has made the judgment in NEPA that an EIS is required." Commerce Brief at 12. We do not, of course, argue that congressional intent does not control. Our position simply is that Congress did not intend to adopt such a hard and fast rule invariably requiring an EIS on relicensing and that, in gleaning Congress' intent, it is not unreasonable to consider the nature and extent of the burdens that a proposed statutory construction imposes upon an agency. Moreover, the Secretary has offered no support for the conclusory assertions that the Commission should be able to prepare an EIS within "the existing time period already required for relicensing," Commerce Brief at 12, or that the "burden of preparing an EIS . . . should be significant." *Id.*

Fairly read, the Secretary's discussion concerning the Section 6 issue, Commerce Brief at 12-14, serves only to underscore the Commission's claim, FERC Brief at 16, 19-21, that the decision below creates confusion and un-

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[4] The Secretary's reliance on *Lac Courte Oreilles Bands v. FPC*, 510 F.2d 198 (D.C. Cir. 1975), Commerce Brief at 8, 10, for the proposition that those responsibilities are the same in either situation is misplaced, since the issue in that case concerned whether the Commission must issue annual licenses while deciding on relicensing. 510 F.2d at 200.

certainty. According to the Secretary, the Court's "holding" simply requires the Commission to "study" a project's effect on fish resources before issuance of a license, and no more. Commerce Brief at 12. But, if that were all, the Commission met the Court's test by basing its 1981 conditions on the best data then available. FERC Brief at 19.

Nor does the Secretary fully explain what that "study" requires—although it seems that he would read the opinion of the Ninth Circuit as requiring a full determination of the fishery issues before a license may issue. Commerce Brief at 13, 14. But that goes to the heart of the dilemma caused by the Court's ruling. As things now stand, under the Ninth Circuit's construction the Commission may either issue a license with the hope that the licensee will agree to later "modifications," issue a license based on guesswork or issue no license at all.[5] Without an authoritative determination of its statutory powers, the Commission cannot adequately perform its statutory duties in considering the approximately 100 licenses each year that need "open ended" conditions or "reopener clauses." FERC Brief at 16.

ARGUMENT

I. NEPA DOES NOT MANDATE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT PRIOR TO ISSUANCE OF A LICENSE CONTAINING A RESERVATION OF THE RIGHT TO IMPOSE ADDITIONAL FISH PROTECTION MEASURES

The inappropriateness of automatically requiring an EIS on every relicensing is aptly illustrated by the instant case. The Secretary acknowledges that a non-power license is not an option in this case. Commerce Brief at

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[5] We emphasize that the section 6 issue is present both at the original licensing stage as well as at relicensing.

10, n.7.[6] Thus, there is no question that of the four options open on relicensing to the Commission under the Act—(1) federal takeover, (2) issuance of a non-power license, (3) issuance of a license to a new licensee, or (4) issuance of a new license to the original licensee—only the last was available to FERC with respect to the Rock Island project.[7]

Respondents rely on the fact that a new license could contain different conditions, and that "operational modifications to the project for the purpose of protecting anadromous fish" should be considered in an EIS. Commerce Brief at 11 & n.8. However, because a new license, under the statute, had to be granted to Chelan (regardless of what type of fish measures are ultimately chosen) there has been no change in the status quo of the environment, and hence no "major federal action significantly affecting the quality of the human environment" under section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The Ninth Circuit's total rejection of the long-established doctrine that an EIS is not required if an agency decision does not create a change in the status quo should be corrected by this Court's issuance of a writ of certiorari.

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[6] The Yakima Brief similarly states that "the Court discussed that alternative . . . merely to illustrate the breadth of review required by the FPA at relicensing." *Id.* at 25-26. A non-power license would not be a reasonable alternative, even if it had been sought, because it would be an unjustifiable means of resolving environmental problems of a seasonal or episodic nature related to migration of juvenile anadromous fish.

[7] The Ninth Circuit noted in its opinion that there was no competing applicant, Pet. App. 8. In its order denying rehearing, the Ninth Circuit also corrected its error that FERC would have to consider in an EIS the possibility of federal takeover since federal takeover is inapplicable to projects operated by municipalities such as Chelan. Pet. App. 75.

II. THE FEDERAL POWER ACT DOES NOT BAR ISSUANCE OF A LICENSE CONTAINING A RESERVATION OF THE RIGHT TO IMPOSE ADDITIONAL FISH PROTECTION MEASURES

The constant refrain of Respondents in their Briefs in Opposition is that the Commission did not have to issue a new license to Chelan, but could have simply granted annual licenses until the Commission was prepared to impose additional fish protection measures. *E.g.*, Commerce Brief at 15; Yakima Brief at 18. The issue, however, is whether the Federal Power Act mandated the procedure which Respondents and the Ninth Circuit prefer or whether the procedure chosen by FERC was reasonable and "capable of permitting [FERC] to discharge [its] duties" under the Federal Power Act. *FCC v. Schrieber*, 381 U.S. 279, 290 (1965).

In its Petition, Chelan contended that the linchpin of the Ninth Circuit's holding was that FERC could not impose further conditions for fish protection after issuance of the license. Chelan further contended that there was no support for this position and that it was in conflict with longstanding Commission practice, approved by Congress, of issuing licenses with a reservation of authority to modify project structures and operations. Respondents now contend in their briefs that the discussion by the Ninth Circuit of the Commission's power, pursuant to § 6 of the Act, to modify a license once issued was either merely "dicta," Commerce Brief at 12, or "subsidiary to its main holding," Yakima Brief at 13. Respondents state that the court's decision was based on a "solid analysis" of the Federal Power Act, Yakima Brief at 14, albeit an anlysis that Respondents themselves seem unable to articulate, given their statement that "we will not repeat it [the analysis] here." Yakima Brief at 14.

In fact, the Ninth Circuit's "analysis" of the Act consists principally of heavy reliance upon language from

a House Committee Report accompanying the 1968 amendments to section 15, from which it reaches the conclusion that "relicensing" is the same as "initial licensing" for all purposes. Pet. App. at 8-9. The Secretary again quotes from this Report in which it is stated that "relicensing" would "be deemed to involve 'initial licensing' within the context of the Administrative Procedure Act rather than 'license renewal'." Commerce Brief at 9. However, it appears that Congress was addressing in this language problems under the APA, such as the fact that if relicensing were considered to be license "renewal" under the APA the license would not expire "until the application has been finally determined by the agency." 5 U.S.C. § 558(c). This provision of the APA would be inconsistent with the specific provision of § 15 of the Federal Power Act requiring issuance of annual licenses upon expiration until a new license is issued. For this reason and others already set forth in Chelan's Petition, Pet. at 16, n.12, the legislative history relied on by the Ninth Circuit and Respondents is irrelevant to the issues presently before the Court as to whether the Commission's responsibilities and options on relicensing differ from those on initial licensing.[8]

Another example of the Ninth Circuit's "solid analysis" is its reference to certain decisions under NEPA, stating that "we see no reason why the law should be different under the Federal Power Act." Pet. App. 11. However, the Ninth Circuit relies on statements from NEPA cases to the effect that EISs should precede major federal action because "after major investment of both

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[8] As the Commission has repeatedly stated, initial licensing and relicensing are not the same, and the comments of the Commission set forth in that report were also made in the context of the procedural requirements of the APA and do not constitute, as the Secretary claims, an acknowledgement by the Commission that initial licensing and relicensing are the same for the purposes of NEPA or the Federal Power Act.

time and money, it is likely that more environmental harm will be tolerated." This principle is inapplicable in relicensing situations under the Federal Power Act where the entire investment has been made many years before.

Finally, the Supreme Court's decision in *Udall v. FPC*, 387 U.S. 428 (1967) and the Second Circuit's decision in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (1965), *cert. denied*, 384 U.S. 941 (1966), simply do not provide any basis for the Ninth Circuit's conclusion that the law is "well defined" as prohibiting the procedure adopted by FERC in a relicensing situation. Pet. App. at 10. Respondent Commerce's continued reliance on these cases is particularly surprising given its effort to distinguish the Commission's reliance on *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 104 S.Ct. 2105 (1984). Commerce Brief at 9 n.6. Commerce points out that *Escondido* involved a question under § 4(e) of the Act and is therefore irrelevant to a relicensing issue. Neither *Udall v. FPC* nor *Scenic Hudson*, of course, were relicensing cases and similarly arose pursuant to the Commission's authority to issue licenses established in § 4(e) of the Act. *E.g.*, *Udall v. FPC*, 387 U.S. at 431 & n.1.

In language which Respondents now contend was *dicta*, the Ninth Circuit rejected the procedure adopted by FERC in this case, stating that "we do see a distinct possibility for harm resulting from utilization of a procedure designed to impose fish protection measures in a modification proceeding," Pet. App. 13, on the ground that "the Commission's discretion is curtailed in a modification proceeding." *Id.* at 14. The Commission is entitled to adopt its own procedures unless the procedure does not permit it to discharge its duties under the Act. The Ninth Circuit's reasoning quoted above thus is not *dicta* because only if the Commission is incapable of imposing, pursuant to § 6 of the Federal Power Act, additional fish protection measures after issuance of a license

containing a reopener clause can the Court's decision be upheld.

Respondents, however, do not address the issue of the Commission's power under § 6 of the Act to use reopener clauses—one of the two basic issues in the case. Instead Respondents indirectly attack the Commission procedure by seeking to minimize the achievements of the Commission in developing a long-term, system-wide series of fish protection measures through the vehicle of the Mid-Columbia proceeding. The flaws in this method of attack are twofold. First, it is not the basis upon which the Ninth Circuit decided the case. Secondly, in seeking to create the impression that the Commission is not making any progress in the Mid-Columbia proceeding, Respondents take great liberties with the record. For example, the hearings to be conducted concerning Rock Island are not confined to Chelan's "opposition to further annual stipulations,' Commerce Brief at 6, but rather will address the need for further mitigation measures for Rock Island given the results of studies which show far lower mortalities due to the design of Rock Island's "bulb" turbines. The description of the scope of a stipulation between the parties by counsel for the Secretary in a letter dated March 28, 1985 to the administrative law judge (attached hereto as an Appendix) also belies the assertion that project operations at the other dams are proceeding on the basis of annual stipulations with "no schedule for long-term resolution of fishery issues . . ." Commerce Brief at 6; Yakima Brief at 8.

The procedure preferred by the Secretary of Commerce and the Ninth Circuit of issuing annual licenses until the Commission was prepared to impose further fish protection measures would not have provided any greater first protection than that chosen by the Commission. Interim fish protection measures have been developed in the Mid-Columbia proceeding and a framework for the development of long-term measures is now in place. The

Mid-Columbia proceeding is a reasonable means of achieving the goals of the Federal Power Act and is in full compliance with the provisions of that Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

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APPENDIX

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U.S. DEPARTMENT OF COMMERCE
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March 28, 1985

Honorable Stephen L. Grossman
Presiding Administrative Law Judge
Federal Energy Regulatory Commission
825 North Capitol Street N.E.
Washington, D.C. 20426

RE: Mid-Columbia Proceeding
Docket No. E-9569

Dear Judge Grossman:

Enclosed please find the Stipulation entered into by the Public Utility District No. 2 of Grant County, the Public Utility District No. 1 of Chelan County, the Public Utility District No. 1 of Douglas County, the Washington Departments of Fisheries and Game, the Oregon Department of Fish and Wildlife, the National Marine Fisheries Service, and the Colville Tribe, as discussed at our October 30-31, 1984 conference. The Yakima Indian Nation and the Umatilla Tribe have not yet become signatories to the Stipulation.

The Stipulation is a framework agreement on interim protection and development of long-term juvenile fish passage measures for four of the five Mid-Columbia hydroelectric projects, excluding Rock Island Dam. The agreement is in effect now and extends through 1987 in the case of Rocky Reach Dam, and through 1988 in the case of Priest Rapids, Wanapum, and Wells Dams.

Copies of the Stipulation have been served on all parties to this proceeding.

Sincerely,

/s/ F. Lorraine Bodi
F. LORRAINE BODI
Attorney for the National Marine Fisheries Service

Encl.: As noted
cc: All parties
GC File #502-18.6